veyance provisions of the RRRA, are inherently important issues which require concurrent resolution. If this Court merely sustains the judgment below without addressing the constitutionality of the compulsory conveyance provisions of the RRRA, a correction by Congress of only the constitutional defects in the RRRA found by the court below, without remedying the more basic constitutional defect asserted in this cross-appeal, would produce seriously adverse consequences to both the Penn Central creditors and the public interest. This cross-appellant under such circumstances would be required to commence still another action to declare such an amended RRRA unconstitutional on the grounds which are urged on this cross-appeal, thereby resulting in still another round of appeals to this Court from either the grant or denial of an injunction in a subsequent §2282 action attacking the RRRA. Broad public and private considerations, as well as objectives of judicial economy, thus favor the adjudication of this cross-appeal at this time.

CONCLUSION

This Court has jurisdiction of this cross-appeal, and substantial questions are presented requiring plenary consideration. If the Court notes probable jurisdiction of the related appeals by the governmental appellants and the Penn Central Trustees, it should similarly note probable jurisdiction of this cross-appeal.

Respectfully submitted,

August 23, 1974

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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–166

REGIONAL RAIL REORGANIZATION CASES

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

RICHARD JOYCE SMITH, Trustee of the Property
of
The New York, New Haven and Hartford
Railroad Company, Debtor, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*,
Cross-Appellees

ON CROSS-APPEALS FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF CROSS-APPELLANT

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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–166

REGIONAL RAIL REORGANIZATION CASES

RICHARD JOYCE SMITH, Trustee of the Property
of
The New York, New Haven and Hartford
Railroad Company, Debtor, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*,
Cross-Appellees

*ON CROSS-APPEALS FROM THE
JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA*

BRIEF OF
CROSS-APPELLANT

INTRODUCTION

This brief is submitted on behalf of cross-appellant, Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee" and "New Haven," respectively). Since July, 1961, the New Ha-

ven has been in reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205; however, since December 31, 1968 New Haven's former railroad has been operated by Penn Central Transportation Company ("Penn Central"), pursuant to the inclusion approved by this Court in *Penn Central Merger Cases*, 389 U.S. 486 (1968) and *New Haven Inclusion Cases*, 399 U.S. 392 (1970). On June 21, 1970 Penn Central filed a petition seeking reorganization under §77. The New Haven Trustee is presently owed $123,809,404 by Penn Central, exclusive of interest, out of a total purchase price, approved in *New Haven Inclusion Cases*, of $174,635,899, and his standing in this case is predicated upon that unpaid claim. The New Haven Trustee, together with certain other plaintiffs (whose actions were consolidated for oral argument and disposition), prevailed in the court below as to certain of the constitutional contentions presented for decision; however the court below failed to reach other, even more basic, constitutional issues. As a result, although an appellee as to the appeals taken by the defendants below, the New Haven Trustee is a cross-appellant as to so much of the order below as denied in part his claim for relief.

OPINIONS BELOW

The opinions and order of the district court have not yet been reported; they are reproduced in the Joint Appendix of the Appellants and Appellees, pp. 9-83 (hereinafter cited as "JA"). The instant case, *Smith v. United States* (E.D. Pa. Civil Action No. 74-1107) was consolidated for oral argument and disposition below with two related cases, *Connecticut General Ins. Corp. v. United States Ry. Ass'n* (E.D. Pa. Civil Action No. 74-189) and *Penn Central Co. v. Brinegar* (E.D. Pa. Civil Action No. 74-1149).

JURISDICTION

Jurisdiction in this Court is based on 28 U.S.C. §1252. On August 23, 1974, the New Haven Trustee filed a Jurisdictional Statement relating specifically to the jurisdiction of this Court to hear this cross-appeal. By stipulation of counsel for the New Haven Trustee as cross-appellant and all other appellants and appellees, this Brief is being filed in advance of the determination of the Court as to probable jurisdiction in order to facilitate an expedited briefing and hearing schedule as sought by all the parties.

QUESTIONS PRESENTED

1. Was the court below in error in refusing to adjudicate whether or not the compulsory conveyance provisions of the Regional Rail Reorganization Act, 45 U.S.C. §§701 *et seq.* ("RRRA"), are void on their face as repugnant to the constitutional rights of the New Haven Trustee and other claimants to the Penn Central estate?

2. Did the New Haven Trustee have standing to assert that the enforcement of the compulsory conveyance provisions of the RRRA, if not enjoined, would cause irreparable injury to the New Haven estate?

3. Where a railroad in reorganization under §77 of the Bankruptcy Act is unable to achieve an earnings-based reorganization by reason of large deficits in net railway operating income and the lack of any prospect of earnings, can Congress by enactment of new legislation deprive claimants to the railroad's estate of their right to insist upon termination of rail operations and the sale of rail properties subject to their mortgage liens for their "highest and best use" value?

4. Considered as an exercise of Congress' Commerce Clause and eminent domain powers, do the compulsory conveyance provisions of the RRRA involve an intentional uncompensated taking, or a taking not compensated in money or its perfect equivalent, of the property of Penn Central, and of claimants to its estate, in violation of the Fifth Amendment to the Constitution?

5. Considered as an exercise of Congress' Bankruptcy Clause powers, do the compulsory conveyance provisions of the RRRA offend substantive due process rights of claimants to the Penn Central estate by divesting such claimants' liens on valuable rail transportation properties in exchange for common stock and other securities of uncertain value of a governmentally-controlled corporation and an illusory deficiency judgment against such corporation?

6. Do the compulsory provisions of §303(b)(1) and (2) of the RRRA, requiring conveyance of rail properties and divestment of the liens of claimants to the Penn Central estate, in advance of judicial determinations as to "highest and best use" value of such properties and the equitable equivalent value of the securities and common stock to be exchanged therefor, offend the procedural due process rights of claimants to the Penn Central estate?

7. Are the compulsory conveyance provisions of §§206, 207, 208, 209, 303 and 304 of the RRRA void as a law, purportedly on the subject of bankruptcies, which is not uniform geographically throughout the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CROSS-APPEAL

The constitutional provisions and statutes involved in this cross-appeal include:[1]

Constitution of the United States:

Article I, Section 8, Clauses 3 and 4
Article I, Section 9, Clause 7
Fifth Amendment

Statutes of the United States:

Regional Rail Reorganization Act, Public Law 93-236, 45 U.S.C. §§701 *et seq.* (JA 391)

Section 77 of the Bankruptcy Act, 11 U.S.C. §205

STATEMENT OF THE CASE

Penn Central is the successor to The Pennsylvania Railroad Company and The New York Central Railroad Company, whose merger was finally approved by this Court in *Penn Central Merger Cases, supra.*[2] As one of the conditions of the merger, the Pennsylvania and New York Central Railroads agreed to purchase the assets of the New Haven, which had been in reorganization under §77 of the Bankruptcy Act since 1961 (United States District Court for the District of Connecticut, No. 30226). Penn and Central effected their merger on February 1, 1968; and New Haven's

---

[1]The text of the Regional Rail Reorganization Act of 1973 is printed in full at JA 391 *et seq.* The text of pertinent provisions of the United States Constitution and of Section 77 of the Bankruptcy Act is printed in the Appendix hereto at A-1 *et seq.*

[2]See also *Baltimore & Ohio R.R. v. United States*, 386 U.S. 372 (1967), refusing to approve the initial decision of the Interstate Commerce Commission ("ICC") until it afforded adequate protection to certain eastern railroads not to be included in the merger.

railroad assets were conveyed to Penn Central on December 31, 1968, by Richard Joyce Smith, Trustee of the New Haven (together with his then co-Trustee), subject to later judicial review of adequacy of the purchase price ordered by the ICC.

On June 21, 1970, Penn Central filed for reorganization under §77 of the Bankruptcy Act (United States District Court for the Eastern District of Pennsylvania, Bky. No. 70-347). Eight days later, this Court indicated approval of the terms fixed by the New Haven Reorganization Court (under §77(e) proceedings on New Haven's plan of reorganization) for sale of New Haven's assets to Penn Central, but reversed and remanded for further proceedings to consider the effect of Penn Central's bankruptcy on the value of the Penn Central's payment, particularly its common stock, included in the consideration. *New Haven Inclusion Cases, supra.*

The early stages of the Penn Central §77 proceedings were devoted to an effort by the Penn Central Trustees to identify the problems which had to be overcome in order to achieve an earnings-based reorganization as contemplated by §77. The initial cash crisis was temporarily alleviated by orders of the United States District Court for the Eastern District of Pennsylvania, Judge John P. Fullam ("Penn Central Reorganization Court") permitting deferrals of interest on debt (other than equipment debt), and most leased line rentals and real estate taxes.[3] In addition, acting

[3]Through December 31, 1973, the following amounts had been deferred: interest, $104 million; leased line rentals, $101 million; taxes, $241 million. Stipulation as to Factual Matters (printed at JA 317-24; hereinafter cited as "Stip. Fact"), ¶¶12, 13, 14. The total of such deferrals was $446 million as of December 31, 1973, and represents a priority administration claim. This total does not include $57 million of interest on $300 million of notes secured by pledge of Penn Central's stock interest in Pennsylvania Co., a non-rail subsidiary. If the interest on the notes secured by the Pennsylvania Co. stock is included, deferrals amounted to $503 million as of December 31, 1973.

pursuant to §77(c)(3), the Penn Central Reorganization Court approved $100 million of Trustees' Certificates,[4] which in order to be marketable required the guarantee of the United States authorized by §3 of the Emergency Rail Services Act of 1970, 45 U.S.C. §662.

A series of Penn Central Trustees' Reports dated February 10, 1971, March 22, 1971, September 17, 1971, February 15, 1972, April 1, 1972, July 1, 1972, October 1, 1972, January 1, 1973, February 1, 1973, and April 3, 1974[5] disclose the history of the Trustees' efforts to achieve a private income-based reorganization of Penn Central. The Trustees began by asserting that Penn Central could be reorganized if certain conditions, not within their control, were met.[6] Subsequent reports spelled out a lack of success in implementing these conditions. Finally, in their January 1, 1973 and February 1, 1973 Reports, the Trustees acknowledged that reorganization would not be possible without a *government grant* (not merely financial assistance by way of loans or guarantee of borrowings) on the order of $600 million to $800 million.

There followed an attempt by the Trustees to implement certain crew-consist changes (which had been the subject of exhaustive, but unproductive, proceedings under the Railway Labor Act), that resulted

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[4] *In re Penn Central Transportation Co. (Order No. 124)*, 325 F. Supp. 302 (E.D. Pa. 1971).

[5] These Trustees' Reports are reproduced as Documents 1 through 10 in the Joint Documentary Submission in the court below, ten copies of which have been filed with the Clerk of this Court.

[6] The New Haven Trustee on March 10, 1972 advised the Penn Central Reorganization Court that in his opinion the Penn Central Trustees' predictions as to reorganizability of Penn Central on an income basis were unduly optimistic. See Doc. No. 11 in the Joint Documentary Submission.

in a strike on February 8, 1973. Congress responded by enacting Senate Joint Resolution No. 59, which imposed a 90-day moratorium on both the work-rule changes and the strike.[7]

Shortly thereafter, acting *sua sponte*, the Penn Central Reorganization Court entered an opinion and order regarding the status of reorganization efforts. *In re Penn Central Transportation Co.*, 355 F. Supp. 1343 (E.D. Pa. 1973). Judge Fullam concluded as follows:

> "Whether the constitutional limit [of erosion] has been exceeded depends primarily upon how the remaining assets are to be valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Under any view of the matter, *it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived.*
>
> "The essence of §77 of the Bankruptcy Act is that the legal remedies normally available to creditors may be held in suspension for a *reasonable time* in order to permit rehabilitation of the enterprise. Whenever it appears that there is *no genuine likelihood of ultimate success, the legal and constitutional justification for restraining creditors from exercising their normal remedies disappears.*
>
> "It has long been apparent that the particular problems of Penn Central cannot be completely divorced from problems of national transportation policy. Railroads are, after all, a regulated industry. However unappealing may be the notion that a regulated industry can become bankrupt, the Trustees' efforts to rehabilitate the Debtor are circumscribed by existing statutes and regulations. To the extent that these statutes and regulations . . . preclude the exercise of self-help in achieving prof-

[7]Public Law 93-5, 87 Stat. 5 (February 9, 1973). Following that rebuke by Congress, the Trustees never again attempted to implement the work-rule changes.

itability, the legislative and executive branches of government must be looked to for solutions, if solutions are to be forthcoming.

• • •

"The legal and constitutional rights of the parties to this reorganization should be evaluated in the light of whatever changes Congress sees fit to enact.

"By the same token, however, this Court cannot ignore the realities of the Debtor's situation. On the basis of the record to date, it appears *highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973.*" *Id.* at 1344-46 (emphasis added).[8]

There then followed proceedings before the ICC in August, 1973 upon proposed plans of reorganization of Penn Central filed by the New Haven Trustee and subsequently by the Penn Central Trustees and Penn Central Company. The ICC's Report dated September 28, 1973 rejected on various grounds all plans submitted for the reorganization of Penn Central,[9] and declined to certify to the Reorganization Court any plan of reorganization under §77(d), essentially adopting the position urged by the United States that reorganization of Penn Central had to await a "solution" for the Northeast that would, in turn, require Congressional action.

---

[8]By the time this appeal has been heard, Penn Central will have been "permitted to operate on its present basis" for more than one year beyond the date of "highly doubtful" constitutionality.

[9]The ICC's Report dated September 28, 1973 is Doc. No. 54 in the Joint Documentary Submission. Extracts from the testimony in the ICC proceedings are set forth in Docs. Nos. 38-53 in the Joint Documentary Submission.

See *infra*, Part II-A, for a detailed discussion of the plans submitted to the ICC under §77(d) and its Report dated September 28, 1973.

On October 9, 1973, the New Haven Trustee filed a Motion to dismiss Penn Central's §77 proceedings pursuant to §77(g), alleging that the point of unconstitutional erosion of the Penn Central estate had commenced not later than January 1, 1973.[10]

On January 2, 1974, the RRRA was signed into law by the President.[11]

On January 25, 1974, the New Haven Trustee filed a complaint asserting that the RRRA was unconstitutional on its face and as applied to Penn Central, naming as defendants the United States, United States Railway Association ("USRA") created pursuant to §201 of the RRRA, and Secretary of Transportation Brinegar (herein referred to collectively as the "Governmental Defendants"). The action was filed in the United States District Court for the District of Columbia. On the same day, other creditors of Penn Central filed a similar complaint in the United States District Court for the Eastern District of Pennsylvania (*Connecticut General v. USRA*, Civil Action No. 74-189). In order to achieve a single expedited proceeding, the New Haven Trustee consented to a motion of the United States and other Governmental Defendants to transfer *Smith v. United States, et al.* to the Eastern District of Pennsylvania pursuant to 28 U.S.C. §1404(a). A third case, *Penn Central Co. v. Brinegar*, was also transferred, under §1404(a), from the District of Columbia.

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[10]Doc. No. 13 in the Joint Documentary Submission. As is noted in greater detail in Part II-A of the Argument, this Motion and a related petition seeking an equity receivership have not been decided. No hearing was held on the §77(g) Motion until May 6, 1974. A previously filed petition of the New Haven Trustee, seeking, *inter alia*, the fixing of a date for termination of operations (Doc. No. 12 in the Joint Documentary Submission), filed on March 16, 1973, was never set down for hearing.

[11]Public Law 93-236, codified as 45 U.S.C. §§701 *et seq.* Section references to the RRRA are to the Section numbers in Public Law 93-236, and not to the codification in 45 U.S.C.

Pursuant to 28 U.S.C. §§2282 and 2284, a three-judge district court, consisting of Circuit Judge Ruggero J. Aldisert and District Judges John P. Fullam and Louis C. Bechtle, was constituted to hear all the cases concerning the constitutionality of the RRRA.

The Penn Central Trustees, who intervened as defendants, answered that the RRRA was constitutional by virtue of the alleged existence of a "Tucker Act remedy" under 28 U.S.C. §1491 to "underwrite" any constitutional deficiency in the RRRA.

After joinder of issue, the New Haven Trustee on April 29, 1974 filed a motion for summary judgment as to certain of the legal issues raised by his Complaint.[12] The Governmental Defendants and the Penn Central Trustees each then filed counter-motions for summary judgment. The factual record was then completed by a Stipulation as to the Record in the Penn Central Reorganization Proceedings, a Stipulation as to Factual Matters, a Joint Documentary Submission, and affidavits of two government witnesses.[13] *Smith v. United States* was then consolidated for purposes of oral argument and disposition on the merits with the *Connecticut General* and *Penn Central Company* cases, in which motions for summary judgment had also been filed.

The issue before the court below was whether an injunction should issue restraining the enforcement of

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[12]The New Haven Trustee's Memorandum of Points and Authorities in Support of Motion for Summary Judgment (filed May 2, 1974, E. D. Pa. C. A. No. 74-1107, Doc. No. 4; see JA 258) at pp.1-8 lists the issues included in his motion for summary judgment.

[13]As noted above, ten copies of the Joint Documentary Submission have been filed with the Clerk of this Court. One of the government's affidavits is Doc. No. 61 in the Joint Documentary Submission; the other is reprinted at JA 226-55. The Stipulation as to Factual Matters is printed at JA 3:7-24. The Stipulation as to the Record is identical to that set forth at JA 197-99.

various sections of the RRRA on grounds of repugnance to the Constitution. The court below granted, in part, the motion of the New Haven Trustee for summary judgment, and issued an order dated June 25, 1974 ("Order"; JA 82-83) which enjoined defendant USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA, and enjoined all defendants from taking any action to enforce the provisions of §304(f) of the RRRA with respect to any abandonment, cessation or reduction of railroad service determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the Constitution (Order, ¶¶1, 2; JA 82). In addition, the court below enjoined all parties "from enforcing, or taking any action to implement, so much of Section 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization [of Penn Central] under Section 77 of the Bankruptcy Act" (Order, ¶3; JA 82).[14] Finally, the court below entered a declaratory judgment that §303 of the RRRA is null and void insofar as it fails to provide compensation for interim erosion pending final implementation of the final system plan contemplated by the RRRA and that §304(f) of the RRRA is null and void as violative of the Fifth Amendment to the Constitution insofar as it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of Penn Central (Order, ¶¶4a, 4b; JA 82-83). The court below also declared a portion of the third sentence of §207(b) of the RRRA to be null and void as violative of Article I, Section 8, Clause 4 of the Constitution in that the RRRA is not uniform geographi-

[14]This portion of the Order was entered *sua sponte* as none of the plaintiffs sought this relief.

cally throughout the United States and, to the extent that the RRRA amends §77 of the Bankruptcy Act, it is a law on the subject of bankruptcies within the meaning of Article I, Section 8, Clause 4 (Order, ¶4c; JA 83).

The court below was not unanimous in every respect. Circuit Judge Aldisert, who wrote the Opinion of the Court, was joined by District Judge Bechtle in disposing of "plaintiffs' threshold contention that the possible future conveyance of rail properties to Conrail [Consolidated Rail Corporation] in consideration for Conrail stock and securities constitutes a Fifth Amendment taking without payment of just compensation" (Opinion of the Court; JA 23) by concluding that "we do not meet these Fifth Amendment questions because we are persuaded that these issues are premature" (Opinion of the Court; JA 23). Judge Fullam concurred in the result, but took the view that certain of the constitutional issues presented were ripe for adjudication and should not have been deferred (Concurring Opinion of Fullam, J., Part I; JA 55-60). The New Haven Trustee as cross-appellant asserts that the court below was in error in finding that it was premature to judge the facial constitutionality of the compulsory conveyance provisions of the RRRA.

The court below was also in disagreement as to whether the RRRA was, to the extent it represents a "law on the subject of bankruptcies," void for want of geographical uniformity under Article I, Section 8, Clause 4 of the Constitution. Judges Fullam and Bechtle so held, but concluded that the only provision in the RRRA that could not be rationalized as being based on Commerce Clause powers was the provision requiring mandatory dismissal of §77 proceedings,[15]

[15]RRRA, §207(b), third sentence, clause (2).

which they held to be void for lack of geographical uniformity (Concurring Opinion of Fullam, J., Part II; JA 64-65). Judge Aldisert dissented from this conclusion on the ground that the RRRA is uniform in its application to creditors, and that creditor parties lack standing to assert the constitutional defect of the RRRA's non-applicability to a debtor railroad located outside the region (JA 26-29). The New Haven Trustee, by this appeal, asserts that the RRRA is void for want of geographical uniformity in a number of respects, including (but not limited to) clause (2) of the third sentence of §207(b), and that, for the reasons set forth in Part II of Judge Fullam's concurring opinion (for the majority of the court), the New Haven Trustee has standing to assert this constitutional defect.

The United States and the other Governmental Defendants, and the Penn Central Trustees as intervening defendants, each filed appeals to this Court from the Order pursuant to 28 U.S.C. §§1252 and 1253 (docketed as No. 74-167, *United States Ry. Ass'n v. Connecticut General Ins. Corp., et al.;* No. 74-168, *United States, et al. v. Connecticut General Ins. Corp., et al.* and No. 74-165, *Blanchette, et al. v. Connecticut General Ins. Corp., et al.*). The New Haven Trustee filed a cross-appeal to this Court (28 U.S.C. §1252) from so much of the Order as denied, in part, his motion for summary judgment (docketed as No. 74-166, *Smith v. United States, et al.*).

SUMMARY OF ARGUMENT

This cross-appeal challenges the constitutional validity of the compulsory conveyance provisions of the RRRA, an issue which the majority of the court below refused to reach on grounds of alleged prematurity. The RRRA was declared unconstitutional in part by the court below, and the court below enjoined certification of any "final system plan" by USRA to the Special Court. This judgment, however, was based solely on the constitutional defect that the RRRA requires Penn Central to sustain enormous operating deficits, and consequent erosion of the estate available to satisfy Penn Central claimants, during the period January 1, 1974 to the date when the compulsory conveyances mandated by the RRRA may occur. The RRRA was held unconstitutional in that it failed to make provision for payment to the estate of just compensation in respect of these operating deficits and consequent erosion. While the decision below is of some help in preventing an unconstitutional taking from being implemented, the issues which the court below found to be ripe for adjudication represent, in effect, but the tip of the iceberg. The issues as to the constitutional defects, both facial and as applied to Penn Central, of the compulsory conveyance provisions of the RRRA are inherently important issues which require concurrent resolution.

The RRRA was enacted by Congress on January 2, 1974 to deal with the unfortunate fact that the Penn Central System[16] and certain smaller railroads in the

[16]The Penn Central System comprises railroad properties of Penn Central Transportation Company, the Principal Debtor, 15 leased lines of Penn Central which have filed for reorganization under §77 as "Secondary Debtors," and numerous other railroads controlled by Penn Central (Penn Central's Form R-1 Report for 1973 (Doc. No. 37 in Joint Doc-

(footnote continued on next page)

Northeast-Midwest region[17] are unable to generate operating revenues in excess of operating expenses, and hence are unable to achieve any net earnings before fixed charges.

The Penn Central system, for example, has incurred deficits of $851,000,000 from the date of its filing (June 21, 1970) through December 31, 1973 (Stip. Fact, ¶10) and an additional deficit of $103,579,392 during the year 1974 through June 30 (Trustees' Report dated August 5, 1974, Doc. No. 7970). Thus the total deficit of the Penn Central System during four years of operations under §77 is $954,000,000.

The basic scheme of the RRRA is to require that all reorganization courts having jurisdiction over railroads in reorganization in the Northeast/Midwest Region issue findings and orders (RRRA, §207(b)) as to whether or not such railroad shall be "reorganized" by means of conveyance, free of all existing mortgage

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(footnote continued from prior page)

umentary Submission) lists 44 transportation companies, including the 15 Secondary Debtors, which are directly controlled by Penn Central and more which are indirectly controlled). The 15 Secondary Debtors own (or lease from other railroads) 9,304 route miles of track (46.9% of the 19,853 route miles included in the System). The RRRA subjects the rail properties of all these subsidiary and leased line companies to the compulsory conveyance provisions of the Act. See §102(10): " 'rail properties' means assets or rights owned, leased or otherwise controlled by a railroad. . . ." This Section contains an exception for non-leased, controlled, but less than wholly-owned subsidiaries, which are Class I railroads, thereby excluding from the RRRA the Pittsburgh & Lake Erie Railroad, a 92.6% owned subsidiary of Penn Central.

[17]There are seven Class I railroad systems operating in the Northeast/Midwest region of the United States now in reorganization proceedings pursuant to §77 of the Bankruptcy Act: Penn Central, Reading, Central of New Jersey, Lehigh Valley and Ann Arbor (each of which has been found to be non-reorganizable on an income basis under §77); and Erie Lackawanna and Boston & Maine (each of which has been found reorganizable on an income basis under §77 and hence excluded from the RRRA). There is one Class II railroad (defined as a railroad with operating revenues of less than $5 million) in reorganization, the Lehigh & Hudson River.

liens (§303(b)(2)), of its "designated" rail properties (§206(c)) to Consolidated Rail Corporation ("Conrail"), a nominally private for-profit corporation incorporated under state law (§301(a)) which, however, is controlled by the United States Government through the device of a statutory provision (§301(d)) which mandates that 8 of the 15 directors of Conrail be government officials or persons appointed by the President with the advice and consent of the Senate. The "designation" is to be done by a final system plan prepared by USRA, a governmental agency specially created for this purpose (§201), with the assistance of the Rail Services Planning Office of the ICC (§205) pursuant to statutory goals (§206(a)), factors (§206(b)), and provisions (§§206(c), (d), (e), (f), (g), (h), and (i)). The final system plan is to be adopted within 420 days of enactment (§207(c)), and submitted to Congress for its approval, which will be deemed given if neither house passes a resolution vetoing the plan during a 60-day period (§208(a)). In the event of a Congressional veto, it is USRA's duty to prepare and submit to Congress a revised final system plan (§208(b)), although there is no time limit for it to do so. When, as and if a final system plan becomes "effective" by surviving the Congressional veto under §208(a), it is to be delivered to the Special Court, Regional Rail Reorganization Act (§209(c)), and copies filed with each reorganization court (§209(d)). Within 10 days after certification of the final system plan by USRA to the Special Court, Conrail must deposit with the Special Court the stock and other securities of Conrail and any obligations of USRA designated in the final system plan (§303(a)(1)). Within 10 days of such deposit, the Special Court must order the trustees of the railroads (whose courts entered §207(b) orders subjecting

them to the RRRA) to convey forthwith to Conrail[18] the rail properties designated in the final system plan. Only *after* the conveyances are made and are irrevocable is there any judicial review (§§303(c) and 303(d)) of the final system plan to assure that it comports with the standards of "fairness and equity" developed judicially during the era of equity receiverships and given statutory sanction by §77.

The foregoing statutory scheme of the RRRA is referred to in this Brief as the "compulsory conveyance provisions of the RRRA." This cross-appeal asserts that the compulsory conveyance provisions of the RRRA are void for repugnance to the Constitution of the United States. This was an issue which the Court below declined to reach on the grounds that the issue was "premature" and not "ripe" for decision. It is also an issue, however, which the Penn Central Reorganization Court was required to reach in its §207(b) "180-day" decision; that Court decided in favor of the New Haven Trustee's position, holding squarely that the RRRA could not be sustained either under the Bankruptcy Clause powers or the Commerce Clause (eminent domain) powers of Congress, and that the RRRA violated the Fifth Amendment rights of secured creditor and stockholder claimants to the Penn Central estate. *In re Penn Central Tranportation Co. (Memorandum in Support of Findings and Order No. 1596 Pursuant to the Second Sentence of §207(b) of the Regional Rail Reorganization Act of 1973)*, (E.D. Pa. July 2, 1974) (JA 124-51).[19] That decision has been appealed by the

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[18]Conveyances may also be directed by USRA to be made to "profitable" railroads operating in the region. A "profitable railroad" means a railroad which is not in reorganization (§102(9)), which in turn is limited to railroads subject to the RRRA (§102(12)). Thus the Erie Lackawanna and Boston & Maine, each in §77 reorganization, are "profitable railroads" as defined.

[19]Hereinafter cited as "Opinion in Support of Order No. 1596."

United States, USRA and the ICC to the Special Court (where it is docketed as No. 74-8), whose decision thereon will be known before this appeal is heard; however, by reason of the seventh sentence of §207(b), no appeal from the Special Court's decision will lie to any Court of Appeals, and hence this Court's statutory *certiorari* jurisdiction under 28 U.S.C. §1254 can not be invoked to review the Special Court's decision.[20]

In the Argument section of this Brief, the New Haven Trustee analyzes why the court below was in error in finding the constitutional issue as to compulsory conveyances under the RRRA "premature" and not "ripe" for adjudication. The basic error was the court's failure to acknowledge the features of the RRRA which will preclude effective judicial review of the same constitutional issues at a later time, namely §209(a) and the last sentence of §303(b)(2). The court below also mis-applied the prior decisions of this Court dealing with when constitutional issues can be avoided by reason of the speculative character of the alleged injury. The New Haven Trustee points out how the RRRA, if the Government Defendants are not enjoined from enforcing it, threatens to destroy the collectibility of the sum of $123,809,404 plus interest owed to him by Penn Central under this Court's decision in *New Haven Inclusion Cases*, *supra*, and thereby subject the New Haven bondholders (for whom he is a fiduciary) to further diminution in the assets of the New Haven estate available to support their claims to the equivalent of a per-parcel liquidation sale of New

[20]However, if a party aggrieved by the Special Court's §207(b) decision files a petition for *certiorari* to this Court under 28 U.S.C. §1651 alleging that the decision gives effect to an unconstitutional enactment of Congress, and that the seventh sentence of §207(b) is itself unconstitutional, this Court may have power to issue a writ "necessary or appropriate in aid of [its] jurisdiction" directly to the Special Court. 28 U.S.C. §1651. *Cf. In re 620 Church Street Bldg. Corp.*, 299 U.S. 24 (1936).

Haven's rail assets as of December 31, 1966. *New Haven Inclusion Cases, supra* at 489-90.

In Section II of the Argument, the New Haven Trustee describes the manner in which the compulsory conveyance provisions of the RRRA violate his Fifth Amendment rights. The legal and factual setting of the RRRA is described, including an historical review of the development of the law in the field of equity receiverships, §77B, Chapter X and §77 of the Bankruptcy Act, from *Northern Pacific Ry. v. Boyd*, 228 U.S. 482 (1913) through the latest definitive decision of this Court, *New Haven Inclusion Cases, supra*. The factual setting includes the treatment of the New Haven Trustee's Plan dated June 27, 1973 for reorganization of Penn Central, an admittedly novel but nevertheless serious attempt by private interests to propose a settlement with the representatives of the public interest which was designed to permit private claimants to receive fair and equitable value of their claims while allowing public-interest claimants to receive securities and common stock of a "core system" made up of Penn Central rail properties comprising 11,000 route miles of mainline and principal feeder lines to be operated as a freight-only railroad divested of responsibility for passenger service. The rejection of that plan, first by the United States Departments of Transportation and Justice (whose cooperation was essential), and then by the ICC by its Report of September 28, 1973 (refusing to certify any plan for Penn Central), casts a long shadow on the Government's principal contention in support of the constitutionality of the RRRA: that Conrail's operations can be made viable through reduced trackage and divestment of responsibility for passenger train operation.

The New Haven Trustee then analyzes the compulsory conveyance provisions of the RRRA in terms of the nature and amount of securities of Conrail and obligations of USRA which can be included in a final

system plan, the limited ability of the Special Court to order additional amounts of the same types of securities provided for in the plan, and its authority to issue a deficiency judgment against Conrail, a provision aptly described below as "essentially circuitous." These features of the statute are then compared to the decisions of this Court in cases where private property is taken for a public use under authority of an act of Congress, which set forth the principle that just compensation means an amount of money or its perfect equivalent equal to the "highest and best use" value of the properties taken for public purposes. The dubious constitutionality of Conrail's acquiring the Boston–Washington corridor properties free of lien in exchange for securities, and then *selling* the corridor properties to Amtrak for $500 million as contemplated by §206(c)(1)(C) and §601(d) of the RRRA, is analyzed, and a decision of Judge Fullam, in the §207(b) proceedings of the Secondary Debtors, holding this feature of the RRRA unconstitutional, is noted (JA 153-56).

The brief then discusses the Government's principal rationale in support of the constitutionality of the compulsory conveyance provisions of the RRRA. The Government contends that if Congress and the governmental agencies can design a Conrail with some limited prospect of earnings, the capitalized value of those prospective earnings automatically fixes the value of all rail properties to be conveyed to Conrail, and that, based on *New Haven Inclusion Cases, supra*, there is no constitutional necessity for the value of the securities issued in a reorganization to be equal to the "highest and best use" value of the railroad property conveyed in exchange for such securities. The Government further contends that even if the fair capitalized value of the reasonably projected net earnings of a reorganized company would be substantially less than the liquidation value of the debtor railroad's rail properties, creditor and stockholder claimants must

nevertheless accept those securities in full satisfaction of their claims. The New Haven Trustee points out that both the opinion of this Court in *New Haven Inclusion Cases, supra,* and the opinion of the New Haven Reorganization Court, fail to support the Government's principal thesis and, in fact, squarely recognize that the claimants to a railroad estate have a right to realize value not less than the "highest and best use" value of the properties subject to their claims.

The brief then discusses the nature of Conrail as a governmentally created and controlled entity, and the distinctions which set the RRRA apart from all prior laws on the subject of bankruptcy. With specific reference to the provisions of §301(d) of the RRRA, the New Haven Trustee points out that Conrail will, for the indefinite future, be wholly controlled by the United States Government, and the owners of 100% of Conrail's common stock will have absolutely no right to control basic decisions which would affect Conrail's viability and profitability, and therefore the value of its stock. Accordingly, viewed solely as an exercise of the Bankruptcy Clause power, it is contended that the compulsory conveyance provisions of the RRRA violate substantive due process rights accorded to claimants by the Fifth Amendment.

The brief next discusses the contention that the requirement that rail properties of Penn Central be exchanged for securities of Conrail is the practical and legal equivalent of a denial of Penn Central's constitutional rights to dismissal of reorganization proceedings and termination of deficit rail operations. The brief discusses the cases which hold that a common carrier's responsibility for continued public service is not absolute but is subject to the Fifth Amendment right to withdraw the carrier's property from service once it has become clear that there is no reasonable expectation of its earning a reasonable return on its investment.

The New Haven Trustee then analyzes the manner in which public interest goals of the RRRA could be implemented by an amendment to the statute which would cure its constitutional defects. It is suggested that the basic defects of the Act could be cured by having USRA initially subscribe to the capital stock of Conrail and thereby assume the burden of entrepreneurial risk with respect to the proposition that Conrail's operations can be so structured as to make Conrail a profitable carrier.

In Section III, the New Haven Trustee turns to a discussion of how the procedures of the RRRA offend procedural due process by mandating conveyance of rail assets prior to judicial review of the adequacy of the consideration, particularly when there is no possibility that a court may subsequently set aside the conveyances upon a finding that just compensation has not been paid.

Section IV of the Argument discusses the contention that the compulsory conveyance provisions of the RRRA, as an amendment of §77 of the Bankruptcy Act, constitute legislation "on the subject of bankruptcy" which is void on grounds of lack of geographical uniformity required by Article I, Section 8, Clause 4 of the Constitution. It is asserted that the court below was correct in holding that claimants to the Penn Central estate have standing to challenge the RRRA on grounds of lack of geographical uniformity, but erred in limiting the impact of its holding to a single provision of the RRRA requiring mandatory dismissal of §77 proceedings upon a finding that the Act's processes are not "fair and equitable." The court's conclusion that the RRRA adds nothing to the powers of reorganization courts under §77 to impair the obligations of contracts of secured creditors of a railroad is asserted to be in error based on a comparison of the operative provisions of the RRRA and their asserted counterparts found in §77.

ARGUMENT

I

THE COURT BELOW ERRED IN NOT DECIDING WHETHER THE COMPULSORY CONVEYANCES MANDATED BY THE RRRA VIOLATE THE FIFTH AMENDMENT RIGHTS OF THE NEW HAVEN TRUSTEE

In his summary judgment motion, the New Haven Trustee sought a permanent injunction against the enforcement of so much of the RRRA as would constitute an unconstitutional taking of Penn Central's rail properties and his mortgage and other lien interests therein.[21] This issue was characterized by the New Haven Trustee in his Memorandum of Points and Authorities in Support of Motion for Summary Judgment (filed May 2, 1974, E.D. Pa. C.A. No. 74-1107, doc. no. 4; see JA 258) as follows:

> "Legal Issue No. 1. Various sections of the 1973 Act [i.e., the RRRA] hereinafter enumerated constitute a taking by force of law for a public use of the property of Penn Central, a railroad in reorganization owning rail properties within the

[21] As is noted in his Jurisdictional Statement, the New Haven Trustee's standing in this case is predicated on ownership of $34,025,800 of defaulted mortgage bonds of Penn Central (Stip. Fact ¶¶1, 2) and also based on his claimed equitable lien, temporarily protected by Order No. 546 of the Penn Central Reorganization Court (Stip. Fact ¶3), to secure the total unpaid portion ($123,809,404, as of December 31, 1973, plus interest) of the purchase price ($174,635,899) approved in *New Haven Inclusion Cases, supra*. In terms of standing, the New Haven Trustee must be deemed to have the rights of a secured creditor to the full extent of his claim, based on the "underwriting" imposed by the New Haven Reorganization Court as to the value of $87.50 per share relative to the 956,000 shares of Penn Central Company common stock which he holds pending adjudication of the New Haven's plan of reorganization, based on this Court's remand, 399 U.S. at 488-89.

meaning of the 1973 Act, and operating under lease rail properties of railroads 'leased, operated or controlled' by Penn Central within the meaning of the 1973 Act

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"(b) upon the date when certain rail properties of Penn Central and the several Lessors (the 'Designated Properties') will be ordered under the 1973 Act to be conveyed pursuant to §303(b) of the Act to Conrail and other transferees referred to in §§206(c), 206(d) and 303(b) of the 1973 Act, as a law providing for a taking for a public use of (i) the right, title and interest of Penn Central as owner in fee or as to a leasehold estate of said Designated Properties; and (ii) of the right, title and interest of Plaintiff as owner of Bonds secured by the Divisional Mortgage, which lien will be divested by operation of §303(b) of the 1973 Act insofar as it attaches to Designated Properties." (*Id.* at 4).

A majority of the Court below (Judges Aldisert and Bechtle) never reached the merits of this contention because of the belief, which it is submitted was erroneous, that this issue was "premature." It is of course true that:

> "Courts do not review issues, especially constitutional issues, until they have to." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring).

But that assumes that the issues so deferred can later be reviewed. The New Haven Trustee asserts by this cross-appeal that there may not be a later time at which a court can *effectively* protect the New Haven Trustee against the threatened unconstitutional taking of his property. If a later opportunity for judicial intervention to prevent an unconstitutional taking will never effectively exist, then the constitutional issue presented here must fall in the "have to" review area where courts should be available to pass on claims of

constitutional right to judicial process, and to provide such process if the claim is sustained.

Judges Aldisert and Bechtle failed to give appropriate significance to the provisions of the RRRA whereby, with the exception of a pre-final system plan civil action attacking the RRRA as violative of the Constitution, under 28 U.S.C. §§1331, 2282 and 2284, Congress has created in the RRRA an exclusive self-contained system of judicial review even more preclusionary than that contained in the Emergency Price Control Act of 1942, which this Court sustained in *Lockerty v. Phillips*, 319 U.S. 182 (1943) and *Yakus v. United States*, 321 U.S. 414 (1944).[22]

Under the second sentence of §207(b) of the RRRA, a decision by the Special Court that Penn Central must reorganize by conveying its rail properties to Conrail has the following effects which preclude later judicial review:

(a) It is a final, non-appealable order, which is purportedly not reviewable in this Court (§207(b), last sentence);

(b) It has an arguable *res judicata* effect on any subsequent contentions that the compulsory conveyance provisions of the RRRA (§§206(c), 206(d), 207(c), 208, 209(c) and (d), and 303(b)) are unconstitutional, since the §207(b) judgment would necessarily have been that the "process" of the RRRA is "fair and equitable" (§207(b), third sentence);

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[22]In *Yakus*, Mr. Justice Rutledge interpreted §204(d) of the 1942 legislation not to preclude a challenge to the constitutionality of price regulations in the Emergency Court of Appeals, and on review by *certiorari*, in the Supreme Court. §207(b), last sentence, purports to exclude this Court from reviewing the Special Court's §207(b) decision by withdrawing the jurisdiction of the Courts of Appeal, whose judgments are reviewable by writ of *certiorari* under 28 U.S.C. §1254. But see 28 U.S.C. §1651 and *In re 620 Church Street Bldg. Corp., supra.*

(c) The implementation of the §207(b) finding by USRA certifying to Congress and then to the Special Court the final system plan would be governed by §209(a) of the RRRA which provides that:

> "Notwithstanding any other provision of law, the final system plan . . . *is not subject to review by any court* except in accordance with this section." (Emphasis added).

(d) The implementation of the §207(b) finding by USRA certifying to the Special Court the final system plan and the Special Court's ordering the conveyances therein set forth would be governed by §303(b)(2), last sentence, of the RRRA, which provides that:

> "Such conveyances [i.e., the conveyances pursuant to §303(b)(1) which Judge Aldisert's opinion assumes could be enjoined in a subsequent civil action under 28 U.S.C. §1331 on constitutional grounds] *shall not be restrained or enjoined by any court.*" (Emphasis added).[23]

Judges Aldisert and Bechtle erred in their approach to the prematurity issue because they failed to observe the consequences of a §207(b) decision in the light of the prohibitions against subsequent judicial action provided in §§209(a) and 303(b)(1).

The foregoing is consistent with Judge Fullam's concurring opinion below[24]:

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[23]Judge Aldisert's opinion below does not treat with the problem created by §209(a) and §303(b)(2).

[24]Although Judge Fullam clearly concurred in the judgment, he parted company with Judge Aldisert on the "prematurity" issue, and his opinion should be read as a dissent as to that issue, particularly since the order in which he concurred enjoins USRA from certifying a final system plan to the Special Court under §209(c) of the RRRA.

". . . the majority fails to reach a number of issues which I feel must be faced, not only because they are indeed ripe for decision, but because the principal conclusion expressed by the majority—that the Regional Rail Reorganization Act of 1973 is unconstitutional because it fails to provide compensation for interim erosion during the planning period—necessarily depends upon an evaluation of the nature and validity of the Act's provisions concerning mandatory conveyance of rail properties to Conrail. In short, I believe the majority has attempted to isolate an issue which cannot be isolated.

* * *

"In considering which issues must be faced at this time, it is important to keep in mind the distinctions between concepts of standing, ripeness, and the need for injunctive relief.

"Unquestionably, one or more of the parties to these law-suits have standing to raise every issue which has been presented. That is, the statute affects these parties in particular, as distinguished from the public at large, in substantial ways. They thus meet the tests of *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Flast v. Cohen*, 392 U.S. 83 (1968).

"The question of whether all of the constitutional issues are ripe for decision requires us to analyze the inevitability of the alleged unconstitutional impact, whereas the immediacy of the alleged threat bears upon the propriety of injunctive relief.

"By July 1, 1974, each of the reorganization courts will have made, or failed to make, findings pursuant to §207(b) of the Act. Under the statute, the effect of these findings or non-findings (as affirmed or reversed by the Special Court within 80 days thereafter) will be either that the statutory processes will inexorably apply to these estates, or

that the §77 proceedings will be dismissed. The plaintiffs assert that the §*207(b) proceedings themselves are unconstitutional on due process grounds. Surely this challenge is now ripe for decision; indeed, the defendants do not contend otherwise.*"

"Plaintiffs challenge the *entire Act* as a violation of the *uniformity requirement* of the bankruptcy clause, Article I, Section 8, Clause 4 of the Constitution. *Again, this issue is undeniably ripe for decision.*

"Finally, plaintiffs pose a series of challenges to the statutory provisions which contemplate the mandatory transfers of rail assets to Conrail or to existing solvent carriers, at prices to be determined by the Special Court after the event, and to be paid in the form of a to-be-determined mixture of Conrail securities, undefined 'other benefits', and possibly a limited amount of guaranteed obligations of USRA. Whether some or all of these 'ultimate conveyance' issues are now ripe for decision is a more difficult question.

* * *

"No one doubts, and in fact the parties have stipulated, that Penn Central rail properties will be included in the Final System Plan. Equally certain is the fact that USRA will deliver to Congress a Final System Plan which is to become effective 60 session-days thereafter. In order to prevent the Plan from taking effect, one House of Congress must act affirmatively by passage of a resolution expressing disapproval of the Plan, §208(a). Section 208(b) makes it the continuing duty of USRA to present final system plans to the Congress until one becomes effective. I cannot equate Congress' reservation of the right to veto the first Final System Plan, or even the second or third, to a situation in which Congressional action is necessary as a precondition to a Final System Plan becoming effective. I believe this Court must assume that the Act means what it says, and that the expressed intent of Congress would be carried out.

"Once a Final System Plan is effective, *i.e.*, when the 60-day Congressional action period expires, the Special Court is required under §303(b) to order conveyance of the property, *there remains no discretionary role to be played by the Special Court, or any other court, at that point.* Therefore, it is clear that if the reorganization court *does not make §207(b) findings that remove the railroad from the RRRA, conveyances are certain,* save only amendment or repeal of the RRRA. Of course, the possibility of future legislative and executive action is always present during the judicial evaluation of the constitutionality of a statute, and does not render such adjudication premature.

"The last potential exit would be a finding by the reorganization court that the RRRA 'does not provide a process which would be fair and equitable to the estate of the railroad in reorganization,' §207(b). In my view, this possibility does not raise an issue of ripeness, but rather, a question more akin to abstention.

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". . . it is highly improbable that a reorganization court could successfully reject the statute as unfair or inequitable under §207(b) for reasons of less than constitutional magnitude. Indeed, the government's position at the June 10 hearing in the reorganization court was that nothing short of unconstitutionality would justify rejection of the Act under §207(b). Thus, the issue is essentially whether it is preferable for the three-judge court to rule on the constitutional issues surrounding the conveyance provisions, either directly or in conjunction with plaintiffs' due process attack on §207(b), before the reorganization courts act under §207(b).

"The policies embodied in 28 U.S.C. §2282 appear applicable in this case. Enforcement of major federal legislation is sought to be enjoined. As a prac-

tical matter, a decision by the reorganization court under §207(b) that a constitutional infirmity requires the Act to be found not fair and equitable would be equivalent, for all practical purposes, to an injunction that might issue as a result of this three-judge court litigation; and a contrary decision would be equivalent to denial of an injunction.

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". . . I am satisfied that, in the final analysis, many of the constitutional issues concerning the mandatory conveyance features of the Act are necessarily ripe for decision at this time because of their relationship to the issues of interim erosion. While it is not necessary to determine whether or not the contemplated transfers would amount to takings in the constitutional sense, requiring advance assurance of payment in cash or equivalent, I am persuaded that the constitutional validity of uncompensated interim erosion cannot be properly decided except in the light of the constitutionality of the ultimate result which implementation of the Act would produce." (JA 55-60; emphasis added).

Judge Fullam has thus, it is submitted, correctly shown why it is not premature now to judge the constitutionality of the compulsory conveyance provisions of the RRRA, or to reach the issues as to denial of procedural due process by §207(b) and related provisions of the RRRA. The cases cited in Judge Aldisert's opinion on the prematurity issue are, on the other hand, inapposite for a number of reasons relating to the structure of the RRRA's provisions relative to judicial process.

Judge Aldisert treated the claim that the compulsory conveyance provisions of the RRRA will, if not enjoined, constitute an inadequately compensated taking of plaintiff's property as being analogous to cases

seeking an injunction to restrain threatened enforcement of criminal statutes, invoking the following cases: *Poe v. Ullman*, 367 U.S. 497 (1961); *Eccles v. Peoples Bank*, 333 U.S. 426 (1948); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); and *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961). In each of the foregoing cases the plaintiffs attempted, by pre-enforcement suits challenging the constitutionality of the relevant statute, to restrain the enforcement of the statute as applied to them. In each instance, the Court was compelled to gauge the immediacy of the threat of enforcement and held that none of the fact situations evidenced the clear, present threat of injury necessary to sustain a justiciable controversy.

In *Poe v. Ullman, supra*, for example, plaintiffs were two married persons, and their doctor, who sought a declaratory judgment as to the unconstitutionality of a Connecticut statute prohibiting the use of contraceptive devices or the giving of medical advice about them. The Connecticut courts upheld the statute, even as applied to married couples. After plenary consideration in this Court, the appeal was dismissed, with the Justices voting 5-4 and without an opinion of the Court. Justice Frankfurter (joined by Chief Justice Warren and Justices Clark and Whittaker) thought the case fell within the rules of judicial self-restraint summarized in Mr. Justice Brandeis' concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936). Justice Brennan concurred in the result on the practical ground that:

> "The true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has prevented in the past, not the use of contraceptives by isolated and individual married couples. It will be time enough to decide

the constitutional questions urged upon us when, if ever, that real controversy flares up again." 367 U.S. at 509.

Cases such as *Poe v. Ullman* must, however, be compared with the cases such as *Epperson v. Arkansas*, 393 U.S. 97 (1968), where plaintiffs sought an injunction and declaratory judgment that a 1928 law prohibiting the teaching of evolution was unconstitutional. The Court disposed of any "justiciability" problems as follows:

> "There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in [Arkansas, Mississippi and Tennessee]. Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented." *Id.* at 101-02.

In *Roe v. Wade*, 410 U.S. 113 (1973), plaintiff "Jane Roe" was an unmarried woman who was pregnant at the inception of litigation and who

> "sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes." *Id.* at 120.

This Court found the case of "Jane Roe" presented a justiciable controversy ripe for determination, but that the case of "John and Mary Doe," a married, childless couple, was of a

> ". . . speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may or may not take place, and all may not combine. . . .But we are not prepared

> to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. [Citations omitted] The Does' claim falls far short of those resolved otherwise in the cases the Does urge upon us, namely *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Data Processing Service v. Camp*, 397 U.S. 150 (1970); and *Epperson v. Arkansas*, 393 U.S. 97 (1968)." *Id.* at 128.

In the instant case, the New Haven Trustee's standing and the immediacy of the threatened harm clearly favor justiciability of his claim that the RRRA is unconstitutional under the reasoning of *Epperson v. Arkansas* and *Roe v. Wade*, which cases are not cited in Judge Aldisert's opinion.[25] See also *Steffel v. Thompson*, 42 U.S.L.W. 4357 (U.S., March 19, 1974).

The New Haven Trustee is owed $123,809,404, plus interest, by Penn Central; the entire debt is secured by a claimed (but unadjudicated) equitable lien deriving from this Court's remand, in *New Haven Inclusion Cases, supra*, and $34,025,800 is secured by a first mortgage on the former rail properties comprising the largest portion of the assets conveyed by New Haven to Penn Central on December 31, 1968.[26] The defendant USRA, if not enjoined, presently intends, and thus can be expected, to prepare a final system plan under §206 designating a significant portion, if not all, of these same rail properties for conveyance

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[25] Judge Fullam, dissenting as to prematurity, cited two of the recent cases on the related issues of standing and justiciability, namely *Data Processing Service v. Camp, supra*, and *Flast v. Cohen, supra*.

[26] The United States and the other governmental defendants have conceded for the purpose of this litigation that "It is likely that some of the rail properties of Penn Central subject to the Divisional Mortgage and the indeterminate lien . . . will be designated pursuant to each subsection of §206(c)(1) [of the RRRA] for transfer, sale or conveyance pursuant to §206(d) of the Act in any final system plan made effective under the Act." Stip. Fact ¶4.

to Conrail; Congress intends, and thus can be expected, to approve a final system plan prepared by USRA under §208; the plan so approved is intended, and thus can be expected, to be certified by defendant USRA to the Special Court, under §209(c); Conrail can be expected to deposit the securities provided for in the plan under §303(a); the Special Court can be expected within 10 days of the §303(a) deposit to obey the directive contained in §303(b)(1) to order the Penn Central Trustees to convey forthwith the properties designated in the plan to Conrail; and the Penn Central Trustees can be expected to comply with the Special Court's order. Therefore, if these provisions of the RRRA are not enjoined, the New Haven Trustee's lien, securing $123,809,404, plus interest, can be expected to be divested as provided in §303(b)(2). Obviously, once his lien is divested, the New Haven Trustee is faced with the clear and present danger that in a subsequent §77 plan Penn Central would not have assets sufficient to pay the New Haven Trustee's claim, which will rank junior to administration expenses and Trustees' Certificates which now aggregate close to $1 billion.

In weighing ripeness considerations, the court below should have been guided by this Court's pronouncement in *Railroad Transfer Service, Inc. v. Chicago*,[27] 386 U.S. 351, 357 (1967), that

> "It is difficult to imagine a controversy more actual, alive, and ripe than this one. It has lasted for more than a decade."

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[27]The case involved a Chicago ordinance which purported to require a local inter-terminal carrier to demonstrate annually to the City of Chicago its ability to satisfy the public convenience and necessity, before the City would grant it a license to do business. The issue was whether this ordinance placed an undue burden on interstate commerce and infringed upon an area preempted by the Interstate Commerce Act. The Court reached the merits of this issue over the City's objections that the issue was premature.

With all due respect, *Smith v. United States* may well pose the one case which is even more ripe than *Railroad Transfer Service*, since the New Haven Bondholders, who initially had mortgage liens on certain of the rail properties involved in this case, have had their right to foreclose, and to realize payment of their claim, postponed since 1961. The end of the litigation to assure the New Haven Bondholders payment on their claims, if not hastened by this Court, may well be deferred into the 1980's. Surely, the ultimate impact on the New Haven estate of a §303(b) conveyance order is sufficiently likely and clearly foreseeable that its constitutionality should be adjudicated now. See *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, 341 U.S. at 156.

II

THE COMPULSORY CONVEYANCE PROVISIONS OF THE RRRA VIOLATE THE NEW HAVEN TRUSTEE'S FIFTH AMENDMENT RIGHTS

A. Legal and Factual Setting of the RRRA

As was noted in Judge Fullam's concurring opinion below, in approaching the question of the constitutionality of the compulsory conveyance provisions of the RRRA, it is necessary first to review the "legal theories underlying the reorganization provisions of the Bankruptcy Act, and their application to the Penn Central proceedings apart from, and in relation to, the RRRA itself."[28]

The early cases of corporate reorganization under equity receiverships involved a decision by senior creditor and equity groups that their respective financial interests would be better served by having a new company with scaled-down capitalization assume the business of the financially embarrassed debtor and thereby maintain the values of a going business. The devices chosen evolved out of the procedures of equity: instead of separate bills of foreclosure by each secured creditor group, the court was asked to enter what amounted to a consent decree of foreclosure under which a newly formed company purchased the assets of the debtor in exchange for the securities comprising a portion of the new capital structure. Since the consent of the stockholders of the debtor was considered essential to a consent decree, in an equity receivership plan the new company might exchange a portion of its capital stock for the entire capital stock of the old com-

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[28]Concurring Opinion of Fullam, J. (JA 65); Judge Fullam's analysis is directed primarily to the constitutional limits upon imposing further uncompensated rail deficits on the estate of a railroad in reorganization.

pany.[29] Decisions of this Court, cited in the note, held that these arrangements were subject to judicial scrutiny at the insistance of any non-consenting creditor who claimed that he should be entitled to full recognition in the plan if junior creditors or stockholders were to be allowed to participate at all.

The amendments of the Bankruptcy Act dealing with corporate reorganizations (§77B and Chapter X) and railroad reorganizations (§77, enacted in 1933 and amended in 1935) enacted in the 1930's must be read in the light of practices developed in the field of equity receiverships. Terms such as "fair and equitable" and "conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders" appearing in §77(e) of the Bankruptcy Act were phrases of art which re-

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[29]See, *e.g., Northern Pacific Ry. v. Boyd*, 228 U.S. 482 (1913), and earlier cases therein cited. The device of the consent decree was held not to foreclose a non-consenting creditor of the old company whose claim was reduced to judgment many years later from claiming, even in the absence of fraud, that he was entitled to have his claim paid since valuable consideration was paid to stockholders of the old company. See also *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), in which a consent arrangement involving participation by stockholders of the old company was denied judicial approval under §77B of the Bankruptcy Act. This case was followed by *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510 (1941), also under §77B, in which the "absolute rule of priority" doctrine was held not satisfied in the absence of detailed valuation findings as to the capitalized value of the entire enterprise and the ability of the reorganized company to meet the interest and dividend requirements of the new securities. The consent arrangements in the equity receivership and §77B cases involved intricate packages of corporate securities such as fixed-income bonds, contingent interest bonds, participating preferred stock and common stock, with voting power allocated in different ways depending on such matters as whether contingent interest was earned or preferred stock dividends paid. Such reorganizations were "income-based" reorganizations in the sense that the debtor was a going concern with a record of sufficient income before fixed charges to support a modified capital structure although not its existing structure.

flected the accumulated judicial experience of dealing with equity receiverships.[30]

Section 77, the Bankruptcy Act provision which has governed railroad reorganization from 1933 until the enactment of the RRRA, while departing in many respects from equity receivership and §77B reorganizations, nevertheless involved judicial scrutiny as to whether the standards of the *Boyd*, *Case* and *Consolidated Rock* decisions, *supra* note 29, were met. Section 77(e) required that before a plan of reorganization could be carried out the judge must find that the plan, certified to the court under §77(d) by the ICC, was "fair and equitable." Under §77, the ICC and the court could determine that the stockholders of the railroad, or any class of creditors, had no equity and could properly be awarded nothing in the plan. See *Ecker v. Western Pacific R.R. Corp.*, 318 U.S. 448 (1943); *Group of Institutional Investors v. Chicago, M., St. P. & P. R.R.*, 318 U.S. 523 (1943). The 1935 amendments to §77 included a "cram-down" exception to the voting requirement that the plan be approved by at least two-thirds in interest of each class entitled to participate in the plan. The cram-down exception, which essentially completed a statutory scheme which has remained intact until the RRRA, permitted the judge to override the objections of a dissenting class of creditors provided he determined that the plan provided fair and equitable treatment for the interests of those rejecting it and found that "such rejection is not reasonably justified." See *Reconstruction Finance Corp. v. Denver & R.G.W. R.R.*, 328 U.S. 495 (1946).

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[30] "The words 'fair and equitable' . . . are words of art which prior to the advent of §77B [the predecessor of Chapter X] had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations." *Case v. Los Angeles Lumber Products Co., supra*, 308 U.S. at 115.

Until the reorganization proceeding of the New Haven Railroad which commenced in 1961, prior railroad reorganization cases under equity receiverships and §77 had generally involved debtor corporations which were viable businesses but were financially embarrassed in the sense that their operations could not support their existing capital structures. As Judge Fullam noted in his concurring opinion,

> "Both §77(e) and the Supreme Court's pronouncements in *Consolidated Rock Products, Ecker* and *Institutional Investors* cases require that earning power or income-generating capacity of the debtor be the measure of a railroad's value." (JA 68)

Except for the happenstance of the Penn Central merger, hereinafter discussed, the New Haven's reorganization might well have gone the way of the New York, Ontario & Western Railroad, which ended in a liquidating equity receivership,[31] since the ICC and the Court each found that the New Haven had no possibility of achieving profitable status, or even net income before fixed charges:

> "The concept of 'going concern value' is fictional as applied to the New Haven because it ignores the Railroad's long and continuous history of deficit operations." *In re New York, N.H. & H. R.R.*, 289 F. Supp. 451, 455 (D. Conn. 1968).

In the case of the New Haven's §77 proceedings, a totally fortuitous event emerged to make possible a reorganization plan under §77, rather than dismissal of reorganization proceedings and a liquidating equity receivership: two major, profitable trunk-line carriers,

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[31]See *New York, Ontario & Western Reorganization*, 295 I.C.C. 346 (1956), in which the railroad was declared unreorganizable by the ICC, leading to a dismissal and liquidation of the enterprise. See also *In re New York, Ontario & Western Ry.*, 171 F. Supp. 634, 635, 647 (S.D.N.Y. 1958).

one operating in the New Haven's territory, the New York Central Railroad, and the other a connecting carrier with the New Haven, the Pennsylvania Railroad, petitioned the ICC for authority to merge, thereby opening up the possibility of an inclusion petition by the New Haven Trustee pursuant to §5(2)(d) of the Interstate Commerce Act. What then followed is known to this Court and need not bear repetition. See *Penn Central Merger Cases, supra; New Haven Inclusion Cases, supra.*[32]

In relation to an assessment of the RRRA, the most important aspect of the New Haven experience is that the Trustees of the New Haven perceived that the merger of the Pennsylvania and New York Central Railroads offered the possibility of a solution which recognized both the compelling public interest in maintaining rail transportation in Southern New England and the satisfaction, through securities of a (then perceived to be) profitable trunk line railroad system, of the private interest in realizing the equitable equivalent of the highest and best use value of the New Haven's rail properties. There was thus a *voluntary* decision and recommendation by the Trustees of the New Haven to pursue inclusion in the proposed merged Penn Central, and to seek to sell the New Haven's rail assets to the merged Penn Central, subject to administrative and judicial determinations as

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[32]One aspect of the New Haven situation which does deserve repetition is the fact that the rights of the New Haven bondholders have now been held in suspension under §77 since July, 1961, and no immediate relief is in sight. As Judge Fullam commented in his opinion below:

> "I find it difficult to characterize as due process of law the notion that further interim erosion can be justified because, if the lengthy and complex procedures of the Act do not permit a constitutionally permissible result, the parties may then start over again in the Court of Claims. The rights of the secured creditors of the New Haven, for example, have already been held in suspension for more than ten years." (JA 81).

to the equivalence of value of the assets and the consideration (in the context of a §77 plan of reorganization), as being in the financial self-interest of the claimants to the New Haven estate, as well as in the public interest. The New Haven Bondholders' representatives initially acquiesced in the concept of inclusion, although reserving their rights with respect to the adequacy of the consideration. The Bondholders originally opposed consummation of inclusion prior to a final decision as to the consideration (leading to the "Procrustean measures" language by Mr. Justice Fortas in *Penn Central Merger Cases*, 389 U.S. at 510-11), but later consented to the conveyance of New Haven's assets and divestment of their liens on the basis of assurance of subsequent judicial review as to the adequacy of the consideration. Thus, *New Haven Inclusion Cases* arose in a procedural context totally at variance with the factual setting of the present case.

In the case of Penn Central's reorganization, there was no possibility of a solution involving voluntary acquisition of the rail assets by another carrier or carriers, since no carrier could afford to assume Penn Central's deficits in net railway operating income amounting to some $90 million annually. This, however, did not prevent the private parties in interest from attempting to seek a solution. Particularly significant in the present context was an attempt by the New Haven Trustee to achieve an accommodation between the interests of the public sector in continued rail transportation and the interests of the private creditors and stockholders of Penn Central in receiving value equal to their respective equities in an estate whose overall liquidation value is indicated to be upwards of $4 billion. The New Haven Trustee's Plan for Reorganization of Penn Central, filed with the ICC on June 28, 1973, called for expedited action by the ICC under §1(18) of the Interstate Commerce Act to adopt

a "core system" of 11,000 miles, and to approve and certify pursuant to §77(d) a plan under which the rail properties of Penn Central required for the 11,000-mile system would be transferred to a new corporation, "Core Railroad;" the Boston-Washington passenger corridor would be operated on the basis of a governmental subsidy providing for a return on investment by a new corporation, "Northeast Railroad," which would lease trackage rights for which it would pay Core Railroad a fair rental based on the value of the property fairly allocable to passenger operations; non-rail and surplus rail assets would be segregated; and an investment company called Penn Central Enterprises (all of the securities of which would be issued to private creditor and stockholder claimants of Penn Central, in the order of the priority of their claims) would be created to hold all of the non-rail assets of Penn Central, plus all of the stock of Northeast Railroad, a portion of the stock of the Core Railroad and all the stock of a liquidating subsidiary to which non-essential rail properties would be conveyed. The New Haven Trustee's Plan required the United States and other public interest claimants, including labor claimants, to accept senior debt securities, junior securities and common stock of Core Railroad in exchange for all of their claims. The Plan was not approved by the ICC, which held hearings in August 1973 on the New Haven Trustee's Plan and two other proposed plans for reorganization submitted to it pursuant to §77(d).[33] The United States Departments of

[33]The other plans included a plan filed by the Penn Central Trustees which called for cessation of operation and sale of all rail properties to others, hopefully to public authorities and other railroads interested in operating the properties; and a plan filed by Penn Central Company which contemplated an action against the United States in the Court of Claims under 28 U.S.C. §1491 ("Tucker Act"). The ICC held that the Trustees' proposed plan was not a "plan" within the meaning of §77(d). The ICC rejected the plan filed by Penn Central Company.

Transportation and Justice opposed the New Haven Trustee's Plan. In a report dated September 28, 1973, the ICC rejected the New Haven Trustee's Plan on a number of grounds, but principally that the Core Railroad would not be economically viable.[34]

The efforts represented by the New Haven Trustee's Plan, the opposition to it of the government and its rejection by the ICC, are significant to the decision here. The refusal of the ICC, after objection by the government, to approve a plan calling for an 11,000 mile streamlined "core" freight-only railroad, made up of principal main line and high density feeder routes, as proposed by the New Haven Trustee, must fairly be deemed to cast a long shadow on the underlying theory of the RRRA, which is based on the assumption that Conrail, a freight-only railroad[35] made up of the essential or "core" lines of Penn Central and a few other relatively small bankrupt carriers, could be designed so as to be economically viable.

In any event, the New Haven Trustee treated the ICC's rejection of his Plan as dispositive of any private attempt to arrange an accommodation with the public sector. The Plan provided that, if it were not promptly accepted by the ICC, the United States, organized labor and the States (in respect of tax claims), whose voluntary consent thereto was a necessary precondition, the New Haven Trustee would move promptly under §77(g) for dismissal of the §77 proceedings, and, under §77(i), for an equity receivership calling for the

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[34]As noted above, the ICC's September 28, 1973 Report is Doc. No. 54 in the Joint Documentary Submission. The New Haven Trustee's Plan is described at pp. 27-36; the ICC's conclusions are set forth at pp. 59-77 and in App. DD.

[35]The RRRA contemplates that Conrail will sell or lease the Washington-Boston passenger corridor to National Railroad Passenger Corporation (Amtrak). See §§206(c) (1) (C) and 601 (d) of the RRRA.

prompt liquidation of Penn Central's rail properties.[36] The New Haven Trustee accordingly on October 9, 1973 filed his §77(g) Motion to dismiss Penn Central's §77 proceedings.[37]

Congress was aware of the pendency of the §77(g) motion while it was considering the RRRA, as evidenced by the legislative history.[38] Apparently with the intention of mooting the §77(g) motion, Congress then amended pending bills so as to expand the definition of "railroad in reorganization" (RRRA, §102(12)) to include railroads in equity receiverships.[39] Congress also

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[36]A liquidation equity receivership would not, of course, be inconsistent with a series of sales of rail properties for continued railroad use (at the "highest and best use value") to public authorities (federal and state) and other railroads (such as the major trunk line carriers in the West and South, as well as the Northeast, which carry substantial Penn Central originated and terminated traffic).

[37]Doc. No. 13 in the Joint Documentary Submission. The Penn Central Reorganization Court at first did not hold any hearing on the §77(g) Motion on the ground that it was waiting for a legislative solution. See *In re Penn Central Transportation Company (Columbus Option Appeals)*, 494 F. 2d 270 (3d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3633 (May 8, 1974). On May 6, 1974, a hearing was held on the §77(g) Motion, but no decision has been forthcoming. Judge Fullam has stated that he deliberately deferred action on the §77(g) Motion of the New Haven Trustee: "By a series of actions and inactions which need not be detailed here, this Court held all such proposals in abeyance pending action by Congress on the RRRA." *Opinion in Support of Order No. 1596, supra* (JA 131). On August 8, 1974, by Order No. 1648, Judge Fullam ordered the Penn Central Trustees to file a report on September 3, 1974, and called a hearing on September 17, 1974, with respect to the desirability of sequestration of non-rail income for the purpose of paying taxes and other administration expenses now being deferred, and again specifically deferred any adjudication of the §77(g) Motion pending said hearing.

[38]See, *e.g.*, 119 Cong. Rec. H. 9767 (daily ed. Nov. 8, 1973; remarks of Rep. Shoup, co-sponsor of the Shoup-Adams bill which eventually became the House version of the RRRA); 119 Cong. Rec. H. 9731 (daily ed. Nov. 8, 1973; remarks of Rep. Adams relative to the Shoup-Adams bill).

[39]Compare §103(11) in "Working Paper No. 1, Rail Services Act of 1973," dated Nov. 11, 1973: "(11) 'Railroad in reorganization' means a railroad which is a debtor in a reorganization proceeding under section 77 of the Bankruptcy Act (11 U.S.C. 205)," with §103(12) in S. 2767, reported to the Senate on Dec. 3, 1973, in which the following sentence first appears: "A 'bankruptcy proceeding' includes a proceeding pursuant to section 77 of the Bankruptcy Act (11 U.S.C. 205) or an equity receivership or equivalent proceeding."

designed §207(b) in such a way that one of the possible factual foundations for the granting of the §77(g) Motion, that an income-based reorganization was not possible, would itself trigger compulsory conveyances (RRRA, §207(b), first sentence) rather than a dismissal of the proceedings under §77(g).

Subsequently, the Institutional Investors Penn Central Group and substantially all indenture trustees of Penn Central System bonds petitioned for a prompt termination of rail operations. This petition was premised on a view that termination of rail operations and sale of rail properties could be achieved even if §77 proceedings continued. A petition was also filed by Penn Central Company, the holding company owning all of Penn Central's stock, for a segregation of non-rail properties from rail properties and cessation of rail operations.[40] These petitions, together with the New Haven Trustee's §77(g) Motion, establish the unanimity of substantially all creditor and stockholder parties in the position that deficit rail operations of Penn Central are constitutionally required to terminate.

The relationship between the RRRA and the pending motions to dismiss Penn Central's §77 proceedings and terminate rail operations is clearly stated by Judge Fullam in his opinion below:

> "Another aspect of the RRRA's impact that warrants consideration, is the relationship of the availability of the RRRA's processes to the pending petitions to terminate rail services and to dismiss Penn Central's §77 proceeding. *Obviously, the RRRA is an important factor to be weighed by the reorganization court in assessing [the] validity of the petitioners' contentions*

[40]The petitions to terminate rail operations were heard by the Reorganization Court on May 6, 1974, together with the hearing on the New Haven Trustee's §77(g) Motion, and remain undecided. As noted above, a hearing has been scheduled for September 17, 1974 with respect to the desirability of sequestering non-rail income for the purpose of paying administrative expenses, and Order No. 1648 calling such hearing has specifically deferred adjudication of these petitions and the §77(g) Motion.

that operations can no longer be constitutionally required." (JA 59-60; emphasis added).

Given the history of Penn Central's hopelessly unprofitable rail operations and chronic cash crises resulting from deficit operations,[41] and the utter futility of the private efforts to reorganize Penn Central in the face of opposition of the government and the ICC, it became obvious that if any solution contemplating ongoing operation of the Penn Central System were to be forthcoming, it would have to be a solution created by Congress.

The congressional solution has been aptly described by Judge Fullam as follows:

> "To summarize, the RRRA represents an amalgam of sale, reorganization, and eminent domain concepts. Implementation of the Final System Plan would produce transactions akin to sales under §77(o) or §77(b) (5) of the Bankruptcy Act, *but without the safeguards of participation by the parties or advance judicial scrutiny;* sales in which the price would be paid in a form somewhat like that encountered in a plan of reorganization. The transactions would somewhat resemble a reorganization in which the 'cram down' decision is made by Congress, or at least virtually compelled by Congress, *in advance of formulation of the plan.* And the plain purpose of the entire arrangement would be to insure the continued availability of these rail properties for use in meeting the public need for continued rail service, *without regard to the wishes of the present owners of the*

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[41] As is indicated by Stip. Fact ¶11, in order to continue its operations, it was necessary for Penn Central not only to defer all real estate taxes, leased line rentals and interest payments, but also to utilize extraordinary sources of cash to the extent of $157 million. This amount is exclusive of $28.8 million made available in 1974 to Penn Central by the United States Department of Transportation under §213 of the RRRA; of this amount, $10.8 million was made available in the form of a purchase by the United States of a participation in certain equipment obligations of Penn Central. See Order No. 1480 and Memorandum in Support thereof (Docs. Nos. 29 and 30 in the Joint Documentary Submission). Appeals from Order No. 1480 are pending in the Third Circuit.

properties." (Fullam, J., concurring; JA 77-78; emphasis added).

In the RRRA, Congress set forth what it was willing to do, by way of amending §77 and authorizing and committing monies of the United States[42] by way of a solution, and equally importantly, what it was *not* willing to do. Specifically, Congress indicated that it was *not* willing (except possibly to the extent of $500 million of government-guaranteed bonds of USRA) to permit the estates of Penn Central and other bankrupt carriers subject to the RRRA to be paid the "highest and best use" value of the designated rail properties in any form save that of common stock and possibly more senior securities of Conrail. While the RRRA employs words of "reorganization" and utilizes phrases of art in the law of reorganization, such as "fair and equitable," it does not in fact contemplate reorganization in the accepted legal definition of that word. If "reorganization" in the conventional sense were *possible*, there would have been no need for the RRRA.

As Judge Fullam noted in his concurring opinion below:

> "The Regional Rail Reorganization Act of 1973 represents the Congressional response to the unfortunate fact that the processes and concepts of

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[42]A total of $2.165 billion is authorized by Congress in the RRRA in the form of loans, guarantees and grants: $250 million for labor protection (Title V); $180 million for local rail continuation subsidies (Title IV); $1,500 million for obligations of USRA §210(b); $150 million for loans for acquisition, maintenance or improvements of property (§215); and $85 million for grants to railroads in reorganization (§213). To date, a total of $28.8 million has been made available to Penn Central, of which $10.8 million was in the form of a purchase of outstanding equipment obligations (see Order No. 1480 and Memorandum in Support thereof, Docs. Nos. 29 and 30 in the Joint Documentary Submission) and $18 million was in the form of a grant (see Order No. 1542 and Memorandum in Support thereof, Doc. No. 31 in the Joint Documentary Submission).

§77 outlined above proved inadequate to deal with the current plight of railroads in the Northeast. Section 77 is adequate only when a railroad's revenues are, or can reasonably be predicted to be, in excess of operation expenses.

* * *

"Penn Central and most of the other bankrupt northeastern carriers do not generate net operating revenues, but incur large operating deficits. They cannot achieve reorganization on an income basis under §77." (JA 69-70).

The Congressional response, as reflected in the RRRA, is to mandate that all railroads in reorganization in the Northeast which cannot reorganize on an income basis (RRRA, §207(b)) convey their designated rail properties (§206(c)) to Conrail, a corporation controlled by United States government appointed officials (§301(d)), in exchange for: (1) stock and other securities of Conrail (§206(d)), including obligations of USRA (if affirmatively approved by a joint resolution of Congress—§206(i)—which in any event are limited to $500 million principal amount (§210(b)); and (2) the undefined "other benefits" accruing to such railroad by reason of such transfer (§206(d)). Once a railroad's reorganization court concludes that the railroad should be reorganized by means of conveyance of its rail properties to Conrail (§207(b)), there is no further judicial review provided until after the conveyances of property (§303(b)(1)) and the concurrent divestment of creditors' liens (§303(b)(2)) have been completed. The only "out" from the compulsion of the statute which a reorganization court could exercise if an income-based reorganization is not possible,[43] is a finding that "this Act does not provide a

[43]The reorganization courts supervising the Erie-Lackawanna and Boston & Maine reorganizations found that income-based reorganizations were possible, and thus avoided the compulsion of the RRRA.

process which is fair and equitable to the estate of the railroad in reorganization. . ." (§207(b), third sentence, clause (2)). This finding inherently requires a determination whether or not the processes of the RRRA would be unconstitutional as applied to the railroad.

In the case of Penn Central, the finding has been made that the RRRA does not provide a process which would be fair and equitable to the estate. *Opinion in Support of Order No. 1596, supra* (JA 124-52). The issue raised by this cross-appeal, asserting that the compulsory conveyance provisions of the RRRA violate the New Haven Trustee's constitutional rights, is essentially the same issue which has thus already been decided by the Penn Central Reorganization Court in favor of the New Haven Trustee. The Reorganization Court's decision, however, is subject to review by the Special Court (created pursuant to §209(b) of the RRRA).[44] The Special Court's decision is required by the terms of the sixth sentence of §207(b) to be rendered no later than September 30, 1974. Thus, as of the date of this Brief, it is not known whether the Special Court will decide (a) to sustain a plea of *res judicata*, based on the order of the court below in *Connecticut General* that the RRRA is unconstitutional in failing to provide just compensation in respect of erosion, (b) to affirm Order No. 1596 on the merits,

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[44]The Special Court is a three-judge district court consisting of Circuit Judges Henry J. Friendly (presiding) and Carl McGowan and District Judge Roszel C. Thomsen. It has before it appeals on the merits of Order No. 1596 (docketed as No. 74-8) by the United States, USRA and the ICC (in which the State of New Jersey and the Railway Labor Executives' Association has joined); and a cross-appeal by the New Haven Trustee limited to his jurisdictional contention that the jurisdiction conferred by §207(b) is void under Article III and under Article I, Sec. 8., Cl. 4 of the Constitution. The Penn Central Trustees, although partially aligned with the United States and USRA as to the "Tucker Act remedy" argument, are appellees in support of Order No. 1596 on the merits, as are all of the plaintiffs in *Connecticut General* and the related cases, *Smith v. United States* and *Penn Central Co. v. Brinegar*.

(c) to reverse Order No. 1596 on the merits in spite of the decision below, (d) to decline to reach the merits by finding that jurisdiction is improperly conferred by §207(b), or (e) to defer decision pending a decision by this Court of the appeals and cross-appeals from *Connecticut General* and related cases. The Special Court's decision will presumably have been made prior to the argument of this case. Whatever the Special Court's decision, appeals from its decision are purportedly excluded by the seventh sentence of §207(b).[45]

With this background, we turn to an analysis of why the Congressional "solution" requiring Penn Central, which is unable to reorganize in the conventional manner, to convey its rail assets to Conrail in exchange for stock and securities of Conrail and USRA, is necessarily a violation of the Fifth Amendment rights of secured creditors and other claimants to the Penn Central estate.

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[45]Jurisdictional appeals by the New Haven Trustee from orders Nos. 1543 and 1596 (120-day and 180-day orders under §207(b)) have been filed under §24 of the Bankruptcy Act with the Court of Appeals for the Third Circuit (Nos. 74-1501 and 74-1649). The former appeal was argued on July 18, 1974 and the Third Circuit panel reserved decision pending a decision by this Court in this case. The New Haven Trustee has acknowledged to the Court of Appeals that a favorable decision of his cross-appeal here would moot his jurisdictional appeals from the §207(b) orders and thereby avoid the necessity of decisions as to whether or not §207(b) is void under Article III of the Constitution and the doctrine of separation of powers.

B. The Compulsory Conveyance Provisions of the RRRA Involve an Intentional Taking, Not Compensated by Money or its Perfect Equivalent, of the Property of Penn Central in Violation of the Fifth Amendment Rights of its Creditors and Stockholders

The New Haven Trustee submits, for the reasons set forth below, that the compulsory conveyance provisions of the RRRA (§§206(c), (d), (f), (h) and (i)), 207, 208, 209(c) and (d) and 303(b) and (c), hereinafter collectively referred to as the "compulsory conveyance provisions," are constitutionally void on their face and as applied to Penn Central.

The RRRA authorizes for issuance to the estates of bankrupt railroads, which are subject to the compulsory conveyance provisions of the RRRA, only common stock of Conrail, other unspecified securities of Conrail which may be issued subject to the limitations set forth in §206(i), plus (if Congress concurs by joint resolution pursuant to §206(i)) not in excess of $500 million of obligations of USRA which might be guaranteed by the United States.[46] If the securities of Conrail plus any obligations of USRA authorized by Congress should be determined in the §303(c) proceedings to have less value than the "highest and best

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[46]The $500 million limitation is derived from §210(b), fixing the maximum obligational authority at $1,500 million of USRA securities, of which $1,000 million may be issued to Conrail. Of the latter amount, not less than $500 million is available solely for rehabilitation and modernization of rail properties. Under §206(i), the final system plan may include terms and conditions for any securities to be issued by Conrail in exchange for rail properties which in the judgment of USRA will minimize any actual or potential debt burden on Conrail, and any securities of Conrail which purport to obligate USRA shall not become effective without approval by joint resolution of Congress. Hence, without further action by Congress, even the $500 million of potentially available United States guaranteed debt securities is unauthorized. While Congress could amend the $500 million limitation of §210(b) by a joint resolution, the constitutionality of the RRRA cannot be made to depend on conjecture as to future actions which Congress may or may not take.

use" value of the designated rail properties conveyed, the only remedies allowed for by the statute are the possibility of the Special Court's ordering additional amounts of the same types of securities of Conrail specified in the final system plan(§303(c)(2)(B)), plus entering the §303(c)(2)(C) deficiency judgment against Conrail.

Judge Fullam aptly described the deficiency judgment provision of §303(c)(2)(C) in his opinion below as "essentially circuitous." (JA 77). If the Conrail common stock and securities are insufficient, a deficiency judgment against the property having insufficient value to support the securities representing the property will produce no possible satisfaction of the judgment. Moreover, even if the judgment were satisfied, Conrail's assets would be depleted by the same amount, thereby reducing the value of the common stock, creating a need for a further deficiency judgment. In his *Opinion in Support of Order No. 1596, supra*, Judge Fullam described the deficiency judgment as a "relatively pointless" remedy.(JA 137).

Neither the Penn Central Trustees, as intervening defendants below, nor the Governmental Defendants have presented any analysis of the RRRA which supports any contrary conclusion. The Trustees argued below that the compulsory conveyance provisions of the RRRA are unfair and inequitable to the Penn Central estate *unless* this Court definitively adjudicates that there is a Tucker Act remedy under 28 U.S.C. §1491 to take care of any "short fall" between the consideration provided by the RRRA and the constitutional minimum which would prove to be due under the Takings Clause of the Fifth Amendment.[47]

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[47]The Governmental Defendant's brief below was "in partial opposition to intervening defendants motion for summary judgment" (Doc.

(footnote continued on next page)

The Governmental Defendants likewise relied below upon the "Tucker Act remedy," but with a somewhat different emphasis. The Governmental Defendants argued that if USRA were able to design a final system plan under which Conrail could be shown to have the potential to earn net income before fixed charges, then the capitalized value of the prospective net earnings (*i.e.*, the value of Conrail common stock and its other securities for purposes of reorganization) would automatically *fix the value of the rail properties conveyed* to Conrail. However, recognizing that the value thus determined for rail properties of the bankrupt carriers might be far less than the liquidation value of those properties if sold for their highest and best use, the Governmental Defendants argued below that any constitutional "short fall" could be remedied by a suit in the Court of Claims against the United States.

The Court below unanimously rejected the "Tucker Act remedy" arguments of both the Penn Central Trustees and the Governmental Defendants. The New Haven Trustee asserts that this disposition was correct, and the point will be fully briefed in his Brief herein as an Appellee. In the instant Brief the New Haven Trustee will assume that the Court below was correct without argument of the question, and that no "Tucker Act remedy" exists for any failure of the stock and other securities of Conrail (including up to $500 million of obligations of USRA if subsequently authorized by Congress under §206(i)) to equal the "highest and best use" value of the Penn Central rail assets designated in a final system plan for conveyance to Conrail.

(footnote continued from prior page)

no. 12 in E.D.Pa.C.A. No. 74-1107, May 17, 1974) because the United States interposed the defense of sovereign immunity to any declaratory judgment that a "Tucker Act remedy" exists, while at the same time asserting the affirmative defense of an "adequate remedy at law."

In his motion for summary judgment below, the New Haven Trustee alleged that the RRRA constitutes a taking by force of law for a public use of the property of Penn Central of two types: (a) during the period from enactment of the RRRA through the date of conveyances under §303(b), as a law requiring that private property be devoted to public use without the owner being afforded a reasonable expectation of profit or return on his investment;[48] and (b) upon the happening of the §303(b) conveyances, as a law providing for the taking for public use of (i) the right, title and interest of Penn Central as owner in fee or as to a leasehold estate of the designated rail properties, and (ii) the right, title and interest of the New Haven Trustee as mortgagee and lienholder. The first type of taking was enjoined by the Court's order below. The instant cross-appeal deals with the failure of the Court below to enjoin the second type of taking.

There is no dispute that, once a §207(b) order compelling Penn Central to convey its property were to be entered by the Special Court,[49] the RRRA would, by force of law, inexorably require conveyance of designated rail properties of Penn Central to Conrail in exchange for the consideration of the types specified in the RRRA. There is also no dispute that the consideration specified in the RRRA does not include money.

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[48]The Court below granted this portion of the New Haven Trustee's motion for summary judgment.

[49]As is sought by the United States, USRA, the ICC and the other governmental parties who have filed a joint brief dated August 5, 1974 seeking to reverse Judge Fullam's Order No. 1596 (Special Court, Regional Rail Reorganization Act, No. 74-8). As noted above, the Penn Central Trustees, although they argue for a "Tucker Act remedy" to save the RRRA, are aligned with the creditors and stockholders of Penn Central as appellees in support of Order No. 1596 rejecting the RRRA as not being "fair and equitable" to Penn Central.

The New Haven Trustee submits that, once a taking of private property is established to have taken place under an Act of Congress, or to be the inevitable consequence of the implementation of such an Act, the implementing legislation must provide for payment to the owners of that property of the "full monetary equivalent of the property taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973).[50] See *United States v. Reynolds*, 397 U.S. 14, 16 (1970). In *United States v. Miller*, 317 U.S. 369, 373 (1943), this Court held:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." (Footnotes omitted).

See also *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893), where it was stated that:

> "The noun 'compensation' [as used in the phrase 'just compensation' in the Fifth Amendment], standing by itself, carries the idea of an equivalent. . . . And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. . . . This excludes the taking into account as an element in the compensation of any

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[50] The full quotation is as follows:

"The Fifth Amendment provides that private property shall not be taken for public use without 'just compensation.' 'And 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken' *United States v. Reynolds*, 397 U.S. 14, 16 (footnotes omitted). See also *United States v. Miller*, 317 U.S. 369, 373."

> supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."[51]

The only question which remains, assuming that the "full monetary equivalent" test must be met, is whether the Congress is free to legislate, in connection with a taking, that something other than money shall be the equivalent of money. In other words, can Congress declare, for example, that the stock of Conrail is to be the legal equivalent of money and, if it does, what is the constitutional effect of that legislative declaration? The question was squarely presented in the *Monongahela Navigation* case, *supra*, and was squarely answered as follows:

> "By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. *But this is a judicial, and not a legislative question.* The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or *even what shall be the rule of compensation.* The Constitution has declared that just compensation shall be paid, and the ascertainment of that

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[51]This holding was cited with approval by this Court in 1970 in *United States v. Reynolds*, *supra*, and the *Reynolds* decision was in turn cited with approval by the Court in 1973 in *Almota Farmers Elevator & Warehouse Co. v. United States*, *supra*. Thus there can be no doubt that the *Monongahela Navigation* decision in 1892 remains the current and authoritative holding of this Court on the issue.

is a judicial inquiry." 148 U.S. at 327 (emphasis added).[52]

In the compulsory conveyance provisions of the RRRA (particularly §§206(d), 303(b) and 303(c)), Congress has specifically legislated the nature and rule of the compensation to be provided to railroads in reorganization for the compulsory "transfers or conveyances" of their property. By providing as a limit on, and a test of, "just compensation," that the Special Court shall decide "fairness and equity" on the basis of solely (i) stock and possibly other securities of Conrail, (ii) obligations of USRA not exceeding $500 million principal amount, and (iii) "other [undefined] benefits," Congress is in contravention of the clear holding of the *Monongahela Navigation* case.

There is, in fact, but one medium of exchange which is the "perfect equivalent of the property taken," namely money prescribed by Congress as legal tender for the payment of all debts, public and private. While it has the power to declare what "money" is, and what shall be legal tender for payment of private and public debts, and even to override inconsistent provisions in private contracts,[53] Congress has no power to declare that something which is not money is, as a matter of law, the perfect equivalent of money. As the *Monongahela Navigation, Miller, Reynolds* and *Almota* cases make plain, the law on this subject has not changed since 1795 when it was stated:

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[52]See *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349,364(1936): "Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment." (Footnote omitted). The Court cited with approval the portion of the *Monongahela Navigation* opinion quoted in the text.

[53]As to the power of Congress to make Treasury notes legal tender, see *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871); *Juilliard v. Greenman*, 110 U.S. 421 (1884). As to the power of Congress to invalidate gold clauses in private contracts, see *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240 (1935); and see other "Gold Clause Cases" decided the same day.

"No just compensation can be made except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained. It is not only a sign which represents the respective value of commodities, but it is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is, that land or any thing else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalize the act, and make it valid; nothing short of it will have the effect." *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 313 (Circuit Court Pa. 1795).

These legal precedents establish that the RRRA is unconstitutional on its face and as applied to Penn Central, when considered as an exercise of Congress' Commerce Clause/eminent domain powers, and results in a permanent taking of the property of Penn Central and the New Haven Trustee without payment of just compensation in legal tender, in violation of the Fifth Amendment. As an eminent domain statute, not even the existence of a "Tucker Act remedy" under 28 U.S.C. §1491 to cover a "short fall" between the consideration provided by the Act and the "highest and best use" value of Penn Central's rail properties would suffice to render the statute constitutional, since claimants of Penn Central are entitled to *full payment* in money or its perfect equivalent. *Almota Farmers Elevator & Warehouse Co. v. United States*, *supra*, and other cases cited above. Whether or not the stock or other securities of Conrail have demonstrable value, such securities are plainly not money or its perfect equivalent.

In its *Opinion in Support of §207(b) 180-Day Findings in the Secondary Debtor Proceedings* (E.D. Pa. July 2, 1974) (JA 153-56), the Penn Central Reorganization

Court held unconstitutional the provisions of §§206(a)(3) and 601(d) of the RRRA, which require rail properties in the Boston-Washington passenger corridor to be sold or leased by Conrail to National Railroad Passenger Corporation (Amtrak), following the §303(b)(1) conveyances and the §303(b)(2) divestments of liens. The basis of this holding was that the RRRA, at least in this area, clearly involves an exercise of eminent domain powers without provision for payment of just compensation in money. Judge Fullam observed:

> "A further problem . . . arises in connection with the provisions of the Act dealing with the so-called "northeast corridor" from Boston to Washington. Virtually all of this property is owned by the Secondary Debtors[54] and leased to Penn Central. . . . The Government, in the present proceedings, has taken the position that Conrail will be able to raise $500 million in cash by acquiring the northeast corridor properties and then selling them to Amtrak pursuant to §601(d) of this Act. While the public purpose of these provisions of the statute is quite clear, *the constitutionality of that approach seems particularly dubious.* Certainly, if Congress were to give Amtrak the power of eminent domain, Amtrak could properly acquire the corridor properties. But I find it difficult to accept the theory that it is constitutionally permissible for the government to achieve that result by means of the RRRA, *without providing the present owners of the property with cash or its equivalent.*" (JA 155; emphasis added).

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[54]The corridor properties owned by the Secondary Debtors are located between New York City and Washington. Between the New York-Connecticut state line and Providence, R.I., the corridor properties are former New Haven properties which are subject to the New Haven Trustee's Mortgage and claimed equitable lien.

C. The Fifth Amendment Requires that a Railroad in Reorganization, Which Is Unable to Earn Net Railway Operating Income and Whose Properties Are Required to Be Continued in Perpetual Public Service, Be Paid Not Less than the "Highest and Best Use" Value of its Rail Properties

Aside from Tucker Act remedy considerations,[55] the gist of the contentions of the United States and USRA that the processes of the RRRA do not involve an unconstitutional taking of property rests on an assumption as to a valuation theory which appears to be a complete misreading of the holding of *New Haven Inclusion Cases, supra.* The point was specifically addressed in a colloquy between counsel representing the United States and USRA and Judge Fullam at the "180-day" hearing on June 10, 1974:

> THE COURT: "Perhaps it is the lateness of the hour, but it would seem to me one of the factors the Court would certainly have to consider in deciding whether this Act provides a fair and equitable process would be what the probable outcome or what the possible outcome would be at the valuation stage.
>
> MR. CUTLER: "My difficulty with that is there are so many imponderables involved on both sides of that valuation equation.
>
> "To begin with, if a profitable railroad can be created, then it may be the only value that these estates are entitled to is the capitalized earning power of the profitable railroad. They may not be entitled to liquidation value. So you may not have to add in any other benefits at that point.

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[55]As noted above, the unavailability of a "Tucker Act remedy" is not argued in this Brief but will be discussed fully in the New Haven Trustee's Brief as Appellee.

"That is a point the Supreme Court expressly reserved in the New Haven case. It is one Judge Anderson never reached himself when he said that he thought the right thing was liquidation value, not because it is constitutionally required. So that is an open issue.

THE COURT: "Of course, it has always been assumed up until this point that going concern value was greater than liquidation value, hasn't it? Hasn't that usually been the assumption?

MR. CUTLER: "The point was in the earlier reorganization cases that may very well be true, the early going concern value cases, but the precise point was reserved, as I said, by the Supreme Court in the New Haven case. So there is an open issue.

"If a profitable railroad can be created, even if it is a billion-dollar railroad, let's say its value capitalized is a billion dollars, and the liquidation value were theoretically more, that doesn't automatically demonstrate that the consideration to be paid is less than a constitutional minimum. That is an open point.

"As to liquidation itself, there are many open points, as you know. There are discounts to be applied. There are the problems of succeeding in abandonments, all of the different things that the Supreme Court considered in the New Haven case." (Transcript of June 10, 1974 hearing, E.D. Pa. No. 70-347, on the 180-day findings pursuant to §207(b) of the RRRA, at pp. 12, 610-12).

In his *Opinion in Support of Order No. 1596, supra,* Judge Fullam noted that this theory of valuation appears in the legislative history to be the basic rationale of the RRRA.

"The legislative history of the Act suggests that many responsible public officials may be proceeding on the assumption that the Common Stock of Conrail (i.e., the capitalized value of its prospective earnings) necessarily and automatically estab-

lishes the value of the rail assets conveyed to Conrail, even if those assets had a higher liquidation value, and even though their value for 'highest and best use' might be much greater." (*Opinion in Support of Order No. 1596, supra*; JA 138).

The Government argues in effect that the value of Penn Central's rail assets can, for Fifth Amendment purposes, be valued solely by reference to the value of the securities issued by a *buyer* of the properties in a context where the properties are the only asset of the buyer. The argument is thus both circular and question begging where the issue is whether the *seller* could realize greater value by a sale of its properties for non-rail use, or by condemnation of its properties by a public authority for continued rail use, or a combination of both. The New Haven Trustee submits that the Government's circular reasoning does not in any event withstand close analysis of the holding of this Court in *New Haven Inclusion Cases, supra.*

Mr. Justice Stewart's opinion (399 U.S. at 481-82) discussed the contention of the New Haven Bondholders "that Penn Central should pay an added amount [in addition to per-parcel sale liquidation value] to reflect the 'going-concern' value of the New Haven." This particular contention was rejected by the Court, not because it was reserving any issue, but because it considered that such payment would give the New Haven Bondholders "the best of both worlds" (*Id.* at 482), a result which the Court found would be "unfair" and "inequitable" to Penn Central (*Id.*). Of particular significance to the instant case is that the Court distinguished the *Fifth Avenue Bus* and *Hudson Rapid Tubes* cases,[56] cited in 399 U.S. at 482, note 80, on the

[56] *In re City of New York (Fifth Avenue Coach Lines)*, 18 N.Y. 2d 212, 219 N.E. 2d 410, *appeal dismissed sub nom. Fifth Avenue Coach Lines v. City of New York*, 386 U.S. 778 (1966); *In re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 734, *cert. denied sub nom. Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1967).

ground that:

> "In neither of these cases did the New York courts require the taking authorities to pay *both* an operating and a liquidating value. Rather, they awarded the owners the value reflecting the highest and best use for their properties—precisely the treatment accorded the New Haven here." (Emphasis in original).

The New Haven Trustee submits that the findings made by Congress in the RRRA, §101(a), constitute a recognition that the railroad properties of Penn Central are, in the words of one of the Government briefs below, an "irreplaceable national asset." As such, the highest and best use value of at least Penn Central's principal rail properties is presumptively for continued railroad use by one or more public authorities. The New Haven Trustee submits that, prior to the valuation hearings by the Special Court (RRRA, §303(c)) at which a definitive theory of valuation of Penn Central's rail properties can be decided upon, the facial constitutionality of the RRRA must be adjudged in the light of the constitutional requirement that valuation of a debtor railroad's rail properties be based on "highest and best value" in the words of Mr. Justice Stewart, and not on an automatic application of a predetermined valuation technique.

On the New Haven's facts, both Judge Anderson and this Court found that liquidation value was greater than going concern value.[57] In both the *Fifth Avenue Bus* and *Hudson Rapid Tubes* cases, the transportation entities were in a hopeless loss situation, and yet they were "irreplaceable" local assets which the public authorities would not tolerate being abandoned and sold piece-meal. The New Haven Trustee submits that Penn Central's case is analogous to *Fifth Avenue*

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[57] *In re New York, New Haven & Hartford R.R.*, 289 F. Supp. 451, 454-55 (D. Conn. 1968); *New Haven Inclusion Cases*, *supra*, 399 U.S. at 481-82.

Bus and *Hudson Rapid Tubes*, and §101(a) of the RRRA confirms this to be so. In *Fifth Avenue Bus* and *Hudson Rapid Tubes*, the amount awarded to the owners of the transportation facility was somewhere between scrap value (argued for by the taking authority) and reproduction cost new, less depreciation (argued for by the owners of the property). This mid-point represented application of the valuation principle of "highest and best use" to the facts of those cases.

All the *New Haven Inclusion Cases* decide is that where, under the peculiar facts of that case, value based on "highest and best use" was equal only to liquidating value for non-rail use, the Court would not compel payment of a greater amount. The Court's opinion does not stand for the proposition that going concern value, *when less than liquidation value*, could be judicially approved as meeting the test of "highest and best use."

It is in light of the discussion at 399 U.S. at 481-82 that one must read the following single sentence of the Court's opinion (399 U.S. at 490) upon which Government counsel presumably relied in his oral argument (see Transcript of June 10, 1974 hearing at p. 12, 637):

> "Nor is it necessary to consider the bondholders' claim that anything less than full liquidation value would amount to an uncompensated taking in violation of the Fifth Amendment."

This sentence is immediately preceded by the following passage which, it is submitted, is totally inconsistent with the Governmental Defendants' reliance on that sentence for its "reservation of issue" position:

> "The purchase price that the Commission and the reorganization court have required Penn Central to pay to the New Haven estate is based upon the liquidation value of the seller's assets, appraised as of

> December 31, 1966. That price hypothesizes a shutdown of New Haven, followed by a sell-off of its assets *at their highest and best value*. In the circumstances of this case, and for the reasons we have already set out at length, we agree with the reorganization court that it would be unfair and inequitable to allow Penn Central to take the properties for any lesser sum. Moreover, we today require a reassessment of the consideration that Penn Central is to give in exchange for those properties. We thereby accord the bondholders the right to a liquidation and a per-parcel sale that is theirs by virtue of their mortgage liens. The Bankruptcy Act does not require that they be given more." 399 U.S. at 489-90 (emphasis added).

The portion of Judge Anderson's August 13, 1968 opinion presumably relied upon by the Governmental Defendants is the following two sentences:

> "It is the opinion of the court that the Penn-Central should pay to the Trustees of the New Haven at least the liquidation value of the New Haven as of December 31, 1966. This is so not because the Constitution necessarily requires it but because that standard, under the circumstances of this case, is fair both to the creditors and to the Penn-Central." 289 F. Supp. at 454.

It is submitted that neither Mr. Justice Stewart nor Judge Anderson was reserving the issue as to whether the New Haven Trustees could, consistent with the Fifth Amendment, have been paid *less* than liquidation value. Rather, each court was limiting its respective opinion to the facts of the New Haven situation. Each court concluded that the "highest and best use" value of the New Haven's rail assets was to be measured by a hypothetical liquidation and per-parcel sale for non-rail use. Judge Anderson (289 F. Supp. at 454) refers to the "constitutional minimum of value" as to which the creditors were "entitled," and that those "rights of

creditors cannot be arbitrarily sacrificed or restricted . . . ." It is wholly inconsistent with Judge Anderson's "constitutional minimum" language to read into his opinion an intent to reserve the issue that creditors of a railroad in reorganization might be entitled to less than liquidation value and a per-parcel sale in a situation where "going concern value" was less than liquidation value. This is particularly true since Judge Anderson specifically rejected the "going-concern value" arguments of the New Haven Bondholders because:

> "The concept of 'going concern value' is fictional as applied to the New Haven because it ignores the Railroad's long and continuous history of deficit operations." 289 F. Supp. at 455.[58]

In the case of the Penn Central System, it is now *res judicata* that its railroad properties are not reorganizable on an income basis (Order No. 1543 (JA 103); the governmental parties to this case have not appealed this order). Penn Central's rail properties thus have no "going-concern value." Penn Central is in the same position now that New Haven was in the 1960's. The Government's "capitalized earning power" argument amounts to this: if there had been no Penn-Central merger to serve as the medium by which rail service in the New Haven's territory could have been maintained consistent with the protection of creditor rights which is mandated by the Fifth Amendment, it would have been open to Congress to enact a law under which the New Haven Trustees would have been

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[58]See *New Haven Inclusion Cases*, *supra*, 399 U.S. at 436:

"In approving the negotiators' approach to the price question, the Commission observed that asset value rather than earning power was the primary determinant because 'New Haven had long been dry of earning power.' 331 I.C.C., at 657. 'If there is one thing on this record that is clear and undeniable,' the Commission concluded, 'it is that N[ew] H[aven] has neither earning power nor the prospect of earning power.' *Id.* at 687."

compelled to convey to a nominally private (but governmentally controlled) rail corporation a designated portion of New Haven's rail properties in exchange for common stock and possibly other securities of this new entity, all without benefit of any "underwriting" to assure that the value of this package of securities was equal to $174,635,899, the amount finally approved as the "highest and best use" value of New Haven's assets. Moreover, the Government argues that the capitalized value of the earnings predicted to be earned by the *buyer* of the designated rail properties determines their value to the *seller* even though such properties might have a higher value to the *seller* if sold for non-rail use or if condemned by one or more public authorities. Such an argument confuses the "apples" of the theory of capitalized value in an earnings-based reorganization with the "oranges" of the basic rationale of bankruptcy law, that a debtor's property be applied for the benefit of claimants to its estate in the order of the priority of their claims. This represents a sharp departure from any prior decision of this Court, including most particularly the *New Haven Inclusion Cases*, upon which the Government seeks to rely for its theory of valuation.

D. The RRRA Is Constitutionally Defective in Requiring Payment for Rail Assets in the Form of Securities of Conrail Without Any Provision for a Guarantee that the Value of Such Securities Will Be the Perfect Monetary Equivalent of the "Highest and Best Use" Value of the Rail Assets

This section of the Brief analyzes the nature of Conrail as a governmentally created and controlled entity, the facts in the record as to the value of the rail properties comprising Penn Central's System under the "highest and best use" standard of the *New Haven Inclusion Cases*, and the reasons why securities and common stock of Conrail, plus an amount of governmentally guaranteed debt instruments not exceeding $500 million, could not be viewed as the perfect equivalent of the "highest and best use" value of the portion of Penn Central's rail assets to be designated for conveyance to Conrail under the RRRA.

Although the *compulsory* features of the RRRA are sufficient, by themselves, to distinguish the RRRA from any prior law "on the subject of bankruptcy" heretofore enacted,[59] it is the governmental control of Conrail which most clearly marks the RRRA as an exercise of the Commerce Clause/eminent domain powers of Congress. Compulsory conveyance of properties to a governmentally created and controlled cor-

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[59]It is true, of course, that the "cram-down" feature of §77(e), upheld in the *Denver & Rio Grande* case, *supra*, represents an element of judicial compulsion; however, the court in §77(e) is required to find that a plan rejected by a class of creditors "makes adequate provision for fair and equitable treatment for the interests and claims of those rejecting it" and "such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it . . . ." In the RRRA, by contrast, there is no voting by creditor or stockholder claimants to the railroad's estate, nor any judicial proceedings to determine that their rejection of Congress' plan "is not reasonably justified" in the light of their rights and interests.

poration is not a feature of any prior "law on the subject of bankruptcies." The New Haven Trustee has no quarrel with the Congressional decision to place control of Conrail in the hands of the United States and its agencies in view of the extensive governmental financial commitment to Conrail. But Conrail will necessarily be as much a creature of Congress' will as are Federal Deposit Insurance Corporation, Securities Investors Protection Corporation, and National Railroad Passenger Corporation. These are "nominally" private corporations which, however, serve primarily non-private purposes. Conrail is simply not fairly characteristic of "private enterprise." It is "government enterprise" in its creation, financing and control.

The "government enterprise" nature of Conrail may be judged by the following legislative history:

> MR. KUYKENDALL: "Mr. Speaker, is it not true, I will ask the gentleman from Washington (Mr. Adams) that the creditors are of course given protection, and that the Board of Directors, under the control of Government officials, is the owner of the entire block of 100 million shares, whatever it is?"
>
> MR. ADAMS: "The gentleman is correct. It is controlled by the United States, so long as the Secretary determines that there is an amount of obligation funds which the United States might, in any way ever, have anything to do with.
>
> "During that period of time, it is controlled by a board of directors which consists of Government officials." 119 Cong. Rec. H 11876 (daily ed. December 20, 1973).

The provisions vesting control of Conrail in the United States Government are set forth in §301(d) of the RRRA: so long as 50% or more of Conrail's indebtedness constitute debts owed to, or guaranteed, by USRA or the United States, eight of the fifteen direc-

tors of Conrail will be government officials or persons appointed by the President with the advice and consent of the Senate.[60] Thus, the owners of 100% of the common stock of Conrail will be effectively without voice, having at best 7 of 15 votes on the Board of Directors. Since management decisions will be vested in the Board of Directors by whatever state law Conrail is incorporated under (§301(b)), the owners of the stock of Conrail can expect that Conrail will be managed in the public interest whenever the public interest conflicts with the private interests of the stockholders.

When the RRRA is viewed solely as a "law on the subject of bankruptcy," the following factual distinctions set it apart from any prior exercise of the Bankruptcy Clause power: (1) the RRRA provides for a type of "reorganization" which does not depend on private claimants to the estate seeking the "reorganization" or voting upon it; (2) the "reorganization" is required to be implemented over the unanimous dissent (as exemplified by the present three constitutional complaints before the Court) of the private creditor and stockholder claimants; (3) the "reorganization" does not by its terms insure that private secured claimants will receive the equitable equivalent of a hypothetical foreclosure of their liens, measured by the "highest and best use" value of the properties subject to such liens;[61] and (4) the RRRA

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[60]The 50% test is likely to be met for a considerable period of time if the Conrail's experience parallels that of Penn Central. Private debt and capital markets have indicated a marked reluctance to lend money to Penn Central except with government guarantees. See *In re Penn Central Transportation Co. (Opinion in Support of Order No. 124 approving $100 million of Trustees' Certificates)*, 325 F. Supp. 302 (E.D. Pa. 1971).

[61]The United States and USRA have for the first time contended before the Special Court that:

"USRA and this [the Special] Court on review under Section 303(c),

(footnote continued on next page)

provides that private claimants, in exchange for their legal liens upon tangible physical property, will receive common stock and other securities of a government-controlled, nominally privately incorporated, corporation. The common stock of Conrail has been stripped of all the normal attributes of ownership of stock in a private enterprise. Thus the Penn Central claimants, as potential owners of the vast majority of the shares of common stock of Conrail to be issued, would not have control of the Board of Directors of Conrail, or the right to select its executive officers, or the right to discharge management for incompetence or poor economic performance, or the right to declare dividends when deemed appropriate, or the right to pass on the terms of any debt, or the right to avoid political appointments to a Board whose decisions would entail financial and fiduciary responsibilities, or the right to sell their stock on the New York Stock Exchange or possibly other national securities exchanges,[62] or the right to be assured that they could

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are empowered to provide for the issuance of such Conrail debt securities as they deem necessary or appropriate – including bonds secured by liens on specific properties identical in all security respects to the liens that presently attach." Brief of United States, *et al*, dated August 5, 1974 (Special Court No. 74-8).

While this argument might have some persuasive force if USRA were *required* by the RRRA to issue fixed income mortgage bonds secured by first mortgage liens to the extent of the "highest and best use" value of the rail properties subject to existing mortgage liens divested under §303(b)(1), this is not the case. If USRA designs the final system plan without fixed income mortgage bonds (or if Congress rejects such a proposal when the plan is submitted to it under §208), the Special Court will be unable to remedy the deficiency under §303(c)(2)(B) because that section is expressly limited to "securities of the Corporation. . .as designated in the final system plan."

[62]The provision that a majority of the directors of Conrail be elected by the Government, leaving only a minority to be elected by the holders of 100% of the common stock, would violate the New York Stock Exchange "Policy as to Non-Voting Stock" (New York Stock Exchange, Company Manual, §A-15); see also the rule as to "Unusual Voting Provisions" (*id*). The American Stock Exchange has a similar rule.

sell their stock to the United States or one of its agencies at the price at which it was valued when it was required to be accepted as "payment" of their claims secured by liens on Penn Central's rail properties.[63]

In terms of Congressional intent, it is reasonably clear from the legislative history that Congress was motivated almost entirely by a view of the Constitution which proceeds from the premise, in Senator Hartke's words, that the common stock of Conrail can be "crammed down" on the creditors, and that "judges have ruled that this is fair." 119 Cong. Rec. S 23783-4 (daily ed. December 21, 1973; remarks during debate on Conference Report accompanying H.R. 9142).[64] This view seems to stem from a mis-reading of *New*

[63]Compare the "underwriting" of the Penn Central Common Stock required by the New Haven Reorganization Court, *In re New York, N.H. & H. R.R.*, 304 F. Supp. 793 (D. Conn. 1969), *aff'd in part, rev'd in part, New Haven Inclusion Cases, supra*. It is of course highly significant that a majority of this Court in 1970 believed that Judge Anderson's "underwriting" concept was a sound and necessary provision to assure the New Haven estate's claimants that they would in fact receive the equitable equivalent of the "highest and best value" of New Haven's rail properties, and found it necessary to remand the case because the Court perceived that the underwriting might well have become unrealistic by virtue of Penn Central's subsequent §77 petition. If the RRRA were to be sustained in this Court, the 1970 decision of this Court remanding the underwriting plan because of its insufficiency would be largely mooted since the New Haven's First Mortgage Bondholders would ultimately receive, at best, non-underwritten stock and securities of Conrail, in exchange for which Conrail would receive the bulk of the New Haven's assets valued at $175 million in 1966 for which payment remains to be made.

[64]The entire quotation is as follows:

"We are providing that the creditors of this corporation would be required to take common stock in the *new quasi-government operation*. In other words, they are exchanging their present security interest in the rail properties for common stock in the new corporation.

"The railroad properties then become the properties of the new corporation free and clear of liens and encumbrances. In other words, the assets are being transferred and the rights are being changed. The nonrailroad property will remain in the bankruptcy court to be

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Haven Inclusion Cases, supra, and *Penn Central Merger Cases, supra,* since there is no other authority to support it. The Congressional theory underlying Senator Hartke's thesis must be based on the Bankruptcy Clause, since there are no cases which could be read to stand for the proposition that, for example, Congress could flood a farmer's land as a result of construction of a hydroelectric dam, and require him to accept stock of TVA instead of money for his property.

As a "law on the subject of bankruptcy," however, the RRRA is void as a violation of *substantive* due process. It is a deprivation of property without due process for Congress to divest a creditor of his contractual lien created under state law, and give him in exchange a piece of paper stripped of the normal attributes of an investment security, no matter what aspects of procedural due process are accorded.

The leading cases in which this Court explored the outer limits of Congress' power to pass laws for the relief of debtors from the claims of their secured creditors are the *Rock Island*[65] case, and the *Radford* and the two *Wright*[66] cases under the Frazier-Lemke Act and the amended Frazier-Lemke Act. In the *Rock Island* case, the Court upheld an injunction against fore-

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dealt with by them. One can talk about what is available if the railroad is liquidated and put through the wringer, but even then the chances of these creditors getting their money is relatively slim, and *this country cannot afford cessation of rail service* while the railroads are put through the wringer. So what, in effect, is called the 'cram down' theory forces them to accept this kind of settlement and judges have ruled that this is fair." (Remarks of Senator Hartke; 119 Cong. Rec. S 23783-4 (daily ed. December 21, 1973); emphasis added).

[65] *Continental Ill. Nat. Bank & Trust Co. v. Chicago, R.I. & Pac. Ry.*, 294 U.S. 648 (1935).

[66] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Wright v. Vinton Branch Mountain Trust Bank*, 300 U.S. 440 (1937); *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273 (1940).

closure of a pledge in a §77 case against the contention that it represented an impairment of contract in contravention of the Fifth Amendment. The Court reasoned that "the injunction here goes no further than to delay the enforcement of the contract." 294 U.S. at 681. In *Radford* and the two *Wright* cases, there was no question of a governmental "taking;" the beneficiary of both Frazier-Lemke Acts was the debtor-farmer, and there was neither a government controlled entity involved nor any "public purpose" other than relief of poverty. The rationale of these four cases is that the Bankruptcy Clause and the Fifth Amendment can together support a law which effects a *brief moratorium* on foreclosure of a pledge or a mortgage lien, coupled with an option in the mortgagor at the end of the period to purchase the mortgagee's interest for *cash* equal to the *appraised value* of the property. This result, it is submitted, is not different from the hypothetical liquidation per-parcel sale value of the *New Haven Inclusion Cases*. By implication in all four cases (and express holding in *Radford*), a Bankruptcy Clause enactment (not supported by any possible exercise of eminent domain powers), which deprives a pledgee or mortgagee to a greater extent (such as, for example, divesting his lien and paying him less than appraised value, or not paying him in cash at all but giving him an unsecured or junior obligation of the debtor which is not the equitable equivalent of his secured claim), is a violation of the Due Process clause of the Fifth Amendment.

Thus, §303(b)(2) of the RRRA, by which mortgage liens of creditors are divested *prior* to any judicial determination that the consideration received by the bankrupt debtor upon conveyance of the property is the "fair and equitable" equivalent of the properties valued at their "highest and best use" value, is de-

ficient as Bankruptcy Clause legislation on due process grounds. This is a defect apparent on the face of the RRRA unless it can be reasonably determined that the "highest and best use" value of the designated portion of Penn Central's rail assets will be $500 million or less, that being the amount of obligations of USRA contingently[67] authorized to be included in a final system plan as payment to all estates of railroads in reorganization which convey rail assets under §303(b).[68]

Once it is determined that the stock and other securities of Conrail are not necessarily equal to the "highest and best use" value of the rail assets of Penn Central which would be required to be conveyed under a final system plan, and that the §303(c)(2)(C) deficiency judgment is "essentially circuitous," all that remains to test the facial constitutionality of the compulsory conveyance provisions of the RRRA is to assess whether and under what circumstances this $500 million of theoretically available debt securities (which might or might not carry the full faith and credit of the United States) would tend to provide the Penn Central estate with a total package of securities which could be said to be the "fair and equitable equivalent" of its rail properties.

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[67]Under RRRA, §206(i), any provision in the final system plan which purports to create a direct obligation of USRA is subject to affirmative approval by a joint resolution of the Congress. As noted above, the $500 million limitation is derived from §210(b). There is no assurance that this $500 million of USRA obligations would carry the guarantee of the United States. Section 210(c) of the RRRA provides:

> "The Secretary [of Transportation] shall guarantee the payment of principal and interest on all obligations issued by the Association in accordance with this Act *and which the Association requests be guaranteed.*" (Emphasis added).

[68]Even if the full $500 million of government guaranteed USRA obligations is made available in the final system plan, Penn Central's estate would at best receive only a pro-rata portion since the estates of four other Class I railroads and one Class II railroad would be entitled to pro-rata participation.

To date no definitive valuation findings relating to the rail assets of Penn Central have been made by either the ICC (whose jurisdiction in this area is exclusive under §77(e)) or by the Penn Central Reorganization Court, nor have any hearings been held at which valuation evidence could be administratively or judicially tested. The lack of definitive valuation proceedings, such as those reviewed by this Court in *New Haven Inclusion Cases*, is a consequence of the ICC having failed to formulate any plan of reorganization, and its rejection for various reasons of those plans submitted to it.[69] No valuation hearings have been held by the Penn Central Reorganization Court because it has had no plan certified to it by the ICC. Unless the RRRA is held to be unconstitutional, valuation hearings will *never* be held until after the irrevocable conveyance of Penn Central's rail properties, free of lien, to Conrail.[70]

The evidence before the Reorganization Court on valuation of Penn Central's rail properties consisted primarily of a Day & Zimmermann study which had originally been placed in the Penn Central Reorganization Library established pursuant to Order No. 1179 and was subsequently, in a revised form, filed with the ICC.[71] The Day & Zimmermann study

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[69]ICC Report dated September 28, 1973, *supra*, Doc. No. 54 in the Joint Documentary Submission.

[70]The failure of the RRRA to provide for a definitive hearing on valuation evidence in connection with fair and equitable findings is indicative of the statute's shortcomings under the due process clause of the Fifth Amendment.

[71]Day & Zimmermann, Inc., "The PCTC Physical Asset Valuation Study," April, 1973; Doc. No. 58 in the Joint Documentary Submission; Revised Study, May, 1973, Appendix 1 to Exhibit T-21 (witness: Carlisle) in ICC Finance Docket No. 26241, *In re Reorganization Proceedings of Penn Central Transportation Co.*; Doc. No. 40 in the Joint Documentary Submission. The Reorganization Library was established pursuant to petitions filed by the New Haven Trustee (see petition dated March 16, 1973; Doc. No. 12 in the Joint Documentary Submission), and Morgan Guaranty Trust Co.

estimates the value as of December 31, 1970 of the physical assets of Penn Central and all its leased lines (exclusive of commercial properties owned by Penn Central and its leased lines in the area of Grand Central Terminal, New York City, referred to as "Park Avenue Properties"). The Day & Zimmermann study includes, in part, land not required for rail use, and lines of railroad which USRA might determine should be abandoned rather than included in a final system plan. It is impossible to know at this time what proportion of the Penn Central rail assets studied by Day & Zimmermann would be included in a final system plan. See Stip. Fact, ¶¶4, 5, 6. It is reasonable and conservative to project, however, in terms of the value of all physical assets of Penn Central and its leased lines studied by Day & Zimmermann, that the Penn Central properties designated in a final system plan would be likely to comprise not less than 50% of the total value of the physical assets of the Penn Central System.[72]

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[72]For example, the New Haven Trustee's Plan dated June 27, 1973 for reorganization of Penn Central, submitted to and rejected by the ICC in its September 28, 1973 Report, called for a reduction in route miles from some 20,000 route miles owned by companies in the Penn Central System, of which some 19,000 miles are now operated, to 11,000 route miles; the 11,000 mile "core system" would have required substantially more than half the total value of the physical assets of the Penn Central System which were included in the valuation study prepared by Day & Zimmermann. As the ICC noted in its Report, the 11,000 mile system was selected by the Penn Central Trustees with the aid of computer projections solely on the basis of maximizing profitability. To the extent that the final system plan were to implement the goals set forth in clauses (2) through (8) of §206(a), and not merely that of clause (1), it is reasonable to anticipate that a final system plan would involve more than 11,000 route miles of rail properties of the Penn Central System. The ICC, in its September 28, 1973 Report, observed:

> "The size of this reduced core system [which could be a viable system] will probably lie somewhere between the present [20,000 mile] system and the 11,000-mile and 15,000-mile core systems developed by Wyer [Dick & Co.]." ICC Report, Doc. No. 54 in the Joint Documentary Submission, App. DD, p. 5.

Two different approaches to valuation were presented by the Day & Zimmermann study—one based on a continued rail use methodology, and the other based on an assumed liquidation for non-rail use. In the case of the latter methodology, a present value of a projected stream of future liquidation proceeds was also calculated. In summary, the results of the Day & Zimmermann study were as follows:

Assumption as to "Highest and Best Use"	Total Value of Wholly Owned Assets, Penn Central and Leased Lines as of December 31, 1970[73]
Continued Railroad Use	$13,585,493,000
Liquidation for Non-Rail Uses:	
Estimated Gross Proceeds of Sales over a Period of Years	$ 3,532,110,000
Present Value of Estimated Net Proceeds, after deducting interest factor and all expenses of sale and of preservation of assets pending sale	$ 1,995,778,000[74]

While the Day & Zimmermann valuations remain to be definitively determined by administrative and judicial proceedings, and they are now some 3-1/2 years out of date, they do provide basic evidence upon

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[73]Doc. No. 40 in Joint Documentary Submission.

[74]The present value approach results in *negative* values being assigned to certain leased lines; for example, New York Connecting R.R. has an assumed negative value of $2,898,000, after deducting $8,844,000 as the net cost of demolishing its bridges and tunnels. This is an aspect of the "scrap value" approach which is totally inconsistent with preservation of an "essential national asset." Cf. *In re Port Authority Trans-Hudson Corp., supra*; explained in *New Haven Inclusion Cases, supra*, 399 U.S. at 482 n. 80:

> "The tunnels, which required only $88,000 to be put in working order, had cost $32,000,000 to build, and would have cost $400,000,000 to replace; their liquidating value was a negative figure, because of costs that would have been incurred in plugging them up. [Citation omitted]. Because the Port Authority was taking the tunnels for continued operation, the Court of Appeals held that that the proper valuation was depreciated original cost plus the value of intangible assets also attributable to the operation as a going concern."

which the court below could have properly concluded that $500 million of USRA securities, even if authorized under §206(i) by the Congress, would not have the remotest likelihood of equalling payment in full for the "highest and best use" value of the Penn Central properties likely to be included in the Conrail system. As Judge Fullam observed in his *Opinion in Support of Order No. 1596*:

> ". . . it is clear on the record in this case that rail assets of Penn Central would comprise a very large percentage of the total Conrail system, and there is every reason to suppose that the included properties would be worth considerably more than $500 million. Since no one knows, or can know, at this time, the value of any stock or other securities which Conrail might issue, it would be highly imprudent to assume that there will be no need to resort to the deficiency judgment. Yet obviously, such a judgment would be relatively pointless, serving merely as a further reduction in the value of the common stock." *Opinion in Support of Order No. 1596, supra* (JA 137).

In fact, even using the discounted scrap value approach of Day & Zimmermann (an approach which the New Haven Trustee contends would be wholly erroneous under the *New Haven Inclusion Cases*), and assuming only 50% of the physical assets of the Penn Central rail system would be included in the Conrail system pursuant to the final system plan, one is forced to the conclusion in analyzing the constitutional impact of the RRRA that in no event could a value for the Penn Central rail assets conveyed to Conrail be assumed to be less than $1 billion.[75]

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[75]While the factual record as to valuation of Penn Central's rail properties is not nearly so complete as was the record of the ICC and the New Haven Reorganization Court which was reviewed in *New Haven Inclusion Cases*, the responsibility for an inadequate record does not belong to the Penn Central claimants since Congress has ordered that an irrevocable decision to convey or not to convey Penn Central's rail assets to Conrail be made in advance of any valuation hearings.

Where a *prima facie* case shows that the valuation of Penn Central rail assets required to be conveyed under the RRRA must exceed $1 billion, the Government should not be heard to argue that it is premature to judge the constitutionality of a statute which, under the most generous construction, would guarantee the estate of Penn Central (together with the estates of all other railroads whose property is included in the final system plan) at most the equitable equivalent of $500 million of value in the form of governmental obligations. Since the RRRA provides that reorganization by conveyance of Penn Central's rail assets to Conrail is mandatory, unless the RRRA is struck down as unconstitutional, or the processes of the RRRA are held not "fair and equitable" by the Special Court, this Court is required by the evidence to decide that the consideration afforded by the RRRA is not assured of being the "equitable equivalent" of the "highest and best use" value of Penn Central's designated rail properties. The situation is not essentially different from the decision in the *New Haven Inclusion Cases* where the uncertainty as to the ability of Penn Central to honor the "underwriting" commitment imposed by the New Haven Reorganization Court caused this Court to reverse and remand an otherwise acceptable plan of reorganization:

> "The fairness and equity that are the essence of a §77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value. . . . Accordingly, we set aside the order of the Connecticut District Court insofar as it determines that an intrinsic value of $87.50 inheres in the Penn Central common stock and implements an underwriting plan to secure payment of that sum." *Id.* at 488-89.[76]

[76]This Court's remand on the "underwriting" issue has never been implemented; Judge Anderson attempted to implement it by imposing

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Furthermore, in a context of legislation providing for a public authority (Conrail) to acquire and operate the railroad's properties after divestment of the mortgage liens, the Fifth Amendment requires the public authority to pay, in addition to liquidation value, an incremental factor for "assemblage" of a complete transportation facility. *In re Penn Central Transportation Co. (Opinion and Order No. 1507 re Philadelphia Area Commuter Service)* (E.D. Pa. March 18, 1974) (Slip opinion, p. 12). See *In re Port Authority Trans-Hudson Corp., supra; In re City of New York (Fifth Avenue Coach Lines), supra.* See also Fullam, J., concurring:

> "As a matter of simple maximization of values, if there is no 'going concern' value in the usual sense, there is no justification for continuing a reorganization proceeding [footnote omitted], unless either or both the following conditions are established: . . .(2) a reasonable prospect that the *public need for preserving the debtor's railroad is such that it will be appropriated for public use, and the values inherent in its assemblage as an operating railroad will be recognized and paid for.* [citations omitted]" (JA 70-71; emphasis added).

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an equitable lien on certain properties conveyed by New Haven to Penn Central, and a constructive trust on Grand Central Terminal income, *In re New York, N.H. & H. R.R.*, 330 F. Supp. 131, 150, 331 F. Supp. 212 (D. Conn. 1971), but this judgment was reversed by the Court of Appeals, 457 F. 2d 683 (2d Cir.), *cert. denied*, 409 U.S. 890 (1972) on the jurisdictional grounds that the New Haven Reorganization Court should have deferred to the ICC as to the remand issues. The ICC has "reopened" its proceedings in the New Haven matter, and consolidated them with the Penn Central reorganization proceedings. Order dated September 13, 1973. However, no further hearings have been set by the ICC on the remand issues in spite of the New Haven Trustee's petition dated Feb. 21, 1973 which urged a prompt determination by the ICC of the remand issues. The Penn Central Reorganization Court, *In re Penn Central Transportation Co. (Order No. 546)*, 337 F. Supp. 779 (E.D. Pa. 1972), declined to adjudicate the equitable lien and constructive trust issues, but imposed a protective temporary lien "indeterminate in amount and indeterminate in priority" pending adjudication of the New Haven Trustee's proof of claim.

The RRRA violates the due process and takings clauses of the Fifth Amendment by failing to provide compensation to bondholders of Penn Central, in exchange for divestment of their liens, equal to the "highest and best use" value of their properties, whether that value be determined under either a liquidation value approach or a continued rail use approach. No case can be cited where a court has ruled that the result required by the RRRA "is fair," statements in the legislative history by Senator Hartke to the contrary notwithstanding.

As Judge Fullam observed in his *Opinion in Support of Order No. 1596*:

> "I am satisfied, therefore, that the use of common stock to pay for the rail assets conveyed pursuant to the Final System Plan cannot be justified on the basis of any constitutional doctrine yet announced by the Supreme Court. In my view, the RRRA in its present form does violence to the Constitution, whether considered as a reorganization statute, or as an eminent domain statute, or as a combination of the two." *Opinion in Support of Order No. 1596, supra* (JA 146).

E. A Requirement that Rail Properties of Penn Central Be Exchanged for Securities of Conrail Is a Denial of Constitutional Rights to Dismissal of the Reorganization Proceedings and Termination of Loss Operations

In the case of a railroad whose rail operations do not produce income in excess of operating expenses, and have no reasonable present prospect of doing so, the requirement of the RRRA that the railroad exchange its rail properties principally for common stock of Conrail (plus other undefined securities which "in the judgment of [USRA] will minimize any actual or potential debt burden on [Conrail]" (§206(i))) is the legal equivalent of a denial of the railroad's right to terminate service and liquidate its rail properties. Unless there is an independent constitutional basis for sustaining compulsory continuation of rail operations, it is submitted that the compulsory exchange of rail assets for common stock (plus other securities) of Conrail cannot be sustained. This aspect of the case requires a consideration of the current vitality of the *Brooks-Scanlon–Eastern Texas–Bullock* line of cases[77] in the light of this Court's recent decisions relative to the New Haven's inclusion in Penn Central.[78]

This precise issue was raised in a Penn Central context by the United States, *In re Penn Central Transportation Co. (Columbus Option Appeals), supra.* The Court of Appeals for the Third Circuit stated the government's contention as follows:

> "The government, and to a lesser extent the [Penn Central] trustees, urge that the *Brooks-Scanlon–Louisville Joint Stock Land Bank–Third Avenue–Jersey Central* learning is obsolete because in the *Penn-*

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[77] *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920); *Railroad Commission v. Eastern Texas Railroad*, 264 U.S. 79 (1924); *Bullock v. Florida ex rel. Railroad Commission*, 254 U.S. 513 (1921).

[78] *Penn Central Merger Cases, supra; New Haven Inclusion Cases, supra.*

Central Merger Cases and *New Haven Inclusion Cases* the Court laid down a new principle of constitutional law. That new principle, they urge, is that secured investors in a railroad enterprise take on obligations in relation to the public which makes it appropriate that they run such risk of erosion of their investment as is necessary in the public interest in order to preserve railroad service." 494 F.2d at 279.[79]

This line of argument by the United States perforce required the Third Circuit to analyze the entire New Haven reorganization as it pertained to the *Penn Central Merger Cases* and *New Haven Inclusion Cases*, 494 F.2d at 279-282.

The Third Circuit concluded as follows:

"The constitutionality of the erosion [of the New Haven Estate] which had taken place prior to the valuation date [December 31, 1966] was never presented to the court in any proceeding in which it could have passed upon that issue. The *New Haven Inclusion Cases* decide no more than that Penn Central does not have to pay for erosion which took place prior to its purchase of the assets.

* * *

"The erosion which took place in the New Haven reorganization did not occur because either the reorganization court or the Supreme Court considered that a new interpretation of the fifth amendment was being announced. Rather the reorganization court acting slowly, but with the concurrence of the bondholders, sought a purchaser which would pay creditors what *Brooks-Scanlon*, *Eastern Texas* and *Third Avenue* required." 494 F. 2d at 282.

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[79]The reference in the quotation to *Third Avenue* is to *In re Third Avenue Transit Corp.*, 198 F.2d 703 (2d Cir. 1952); the reference to *Jersey Central* is to *Central R.R. of New Jersey v. Manufacturers Hanover Trust Co.*, 421 F.2d 604 (3d Cir.), *cert. denied*, 398 U.S. 949 (1970).

Similarly, in the §207(b) proceedings under the RRRA before the Penn Central Reorganization Court, Judge Fullam stated the position of the Governmental Defendants:

> "The government has now argued, for the first time, that there will never be any necessity to impose a deficiency judgment against Conrail, because, as a matter of law, the value of the Debtor's rail assets equals the value of Conrail's Comm on Stock. . . .[I]t is significant that this new valuation argument is necessarily based upon the premise that the government can properly require railroads to operate indefinitely." *Opinion in Support of Order No. 1596, supra* (JA 142-43).

Judge Fullam concluded in his 180-day finding under the RRRA as to this issue:

> "The justification for any such thesis must be found in the public interest of avoiding the widespread dislocations which would result from termination of [Penn Central's] rail service. The issue is not where governmental action may be properly taken to avoid such dislocations, but rather whether the method selected by Congress, the RRRA, is a constitutional method of achieving that legitimate public goal. In short, the question is whether the government can avoid such disruptions by imposing the costs and risks of a possible solution upon [Penn Central's] estate. Support for an affirmative answer to that question is to be found, if at all, in the concept that the privilege of a government-protected railroad monopoly gives rise to a residual claim in the public for continuation of railroad operations, to wit, the notion of 'common carrier responsibility' which finds statutory expression in §1(18) of the Interstate Commerce Act.
>
> "The legitimacy of common carrier responsibility is, of course, not in question, but the duration of that responsibility is. Stated briefly, the issue is whether

the government may treat a common carrier whose government-sponsored monopoly is no longer profitable, as if it remained profitable." *Opinion in Support of Order No. 1596, supra* (JA 143).

In light of the Stipulation as to Factual Matters in the record now before the Court (JA 317-24), there is no question that Penn Central's rail operations are unprofitable. The New Haven Trustee's Motion under §77(g) for dismissal of the §77 proceedings, and the related petition seeking adoption of equity receivership proceedings for liquidation of Penn Central's rail properties (Doc. No. 13 in the Joint Documentary Submission), has been pending since October 9, 1973. The factual basis for the granting of the relief sought by the §77(g) Motion now exists in the findings of fact of the Penn Central Reorganization Court in its *Opinion in Support of Order No. 1543 ("120-Day" Findings under §207(b))* (E.D. Pa. May 2, 1974) (JA 84-103). These factual findings are not challenged by either the Governmental Defendants or the Penn Central Trustees.

Under these circumstances, to require Penn Central to exchange rail assets for common stock and other securities of Conrail is, in terms of its economic impact upon secured creditors and other Penn Central claimants, the practical legal equivalent to mandating continued rail operations of Penn Central in the face of hopeless deficits. As applied to Penn Central, the RRRA is unconstitutional in that it deprives the claimants to the Penn Central estate of their right to withdraw the properties subject to their liens from public service and to sell such properties for their "highest and best use value."

F. Adjudication that the Compulsory Conveyance Provisions of the Present RRRA Are Unconstitutional Can and Should Result in a Congressional Enactment Amending the RRRA to Authorize Payment as Required by the Fifth Amendment for Penn Central's Rail Properties

Congress has correctly concluded that rail operations of Penn Central can no longer be carried out by private enterprise. As above argued, Conrail is not "private enterprise." Whether Conrail is "public" or "private," claimants to the Penn Central estate cannot be constitutionally compelled to accept Conrail securities of dubious, if any, value for the Penn Central rail properties which they own or which are subject to their mortgage liens. The compulsory conveyance provisions of the RRRA are thus in irreconcilable conflict with the Fifth Amendment. The "Tucker Act remedy" does not provide a solution because substantively no cause of action exists which could be asserted in the Court of Claims and, even if one did exist, it would in any event require Congress to appropriate billions of dollars because a taking cannot be paid partly in stock and partly in cash.[80]

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[80]Congress has indicated that it presently has no intention of appropriating billions of dollars, or indeed any amount of money, for this purpose. U.S. Representative Brock Adams, one of the original draftsmen of the RRRA and one of the floor managers of the bill in the House of Representatives and a conferee in the conference between the House and Senate which produced the final version of the RRRA, filed an *amici curiae* brief (in which he was joined by twenty-nine other Congressmen) in the Special Court (No. 74-8), in which he advised that Court as follows:

> "It would seem that some creditors hope and expect that if they can destroy this statute, they will force the government to nationalize the Penn Central. They could then claim additional rights under eminent domain principles which would allow them to base their claims on *cash payment* for *highest and best use*. One of the purposes of this brief by the *amici curiae* is to indicate to the court the *strong resistance* which exists in Congress to paying *any additional amounts of government money* to these estates under any such conditions." *Amici Curiae* Brief, at p. 9 (emphasis added).

If the compulsory conveyance provisions of the RRRA are declared void on constitutional grounds, as sought by the New Haven Trustee in this cross-appeal, there is no valid reason why Congress could not amend the RRRA in the following respect to achieve the public interest objectives of the Act in a manner wholly consistent with the Constitution:

1. It could be provided that Conrail's stock would be subscribed and paid for by USRA using funds borrowed by it from the nation's private capital markets on the strength of the full faith and credit of the United States. The United States would thus assume the risk of gain or loss on the stock of Conrail during the initial period required to ascertain whether or not Conrail can surmount the problems which now beset Penn Central and the smaller railroads which may be included in the Conrail system. If Conrail proves to be a viable, profitable rail system, as contended by the Government in this case, USRA, if it desired, could in a few years turn Conrail over to the private sector by a secondary offering of its stock.[81]

2. It could be provided that Conrail will have available to it the right to take rail properties by eminent domain, and to use cash funds generated by the sale of its stock to USRA to pay just compensation as de-

[81] If the Government's theory that the stock of Conrail has "intrinsic" value is correct, after a few years USRA could make a public offering of some or all of its Conrail common stock. Compare the public sale by the United States of all of the stock of General Aniline and Film Corp. which it became free to sell as part of the settlement of the Interhandel litigation under the Trading with the Enemy Act. If Conrail stock has "intrinsic" value, under the Government theory of this case USRA should be able to recoup 100% of its cost by such public offerings, and thus repay the money lent to it by the United States Treasury or borrowed by USRA from the nation's private capital markets on the strength of the full faith and credit of the United States. If, in fact, the stock of Conrail has a market value less than the amount paid by the United States, under applicable Fifth Amendment principles this loss should be borne by the public via taxation rather than be imposed on private creditor interests.

termined by the federal courts.[82] This power of Conrail could of course be conditioned upon USRA's having approved the properties to be acquired. Possession could pass to Conrail upon its deposit in court of the amount initially determined to be a fair estimate of "just compensation" value, and litigation over valuation issues could take place subsequent to Conrail's taking possession of the designated rail properties. After judgment as to valuation, Conrail would pay the balance due, if any, and receive title to the properties free and clear of all liens.

3. The proceeds generated by the deposits and judgments referred to in Paragraph 2 above could be transmitted to the several reorganization courts, with the divested liens of secured creditors attaching to the proceeds, *cf.* §77(o), and the proceeds administered by the railroad's trustees under escrow arrangements[83] pending completion of a "plan of reorganization" by the ICC (§77(d)) and judicial review as to fairness and equity of the distributive aspects of the plan by the reorganization courts (§77(e)).

4. Pending the completion by USRA of the final system plan for Conrail's cash acquisition of rail properties, Congress could legislate that the Secretary of Transportation would make payments pursuant to §213 in such an amount that railroads subject to the new act would have net railway operating income, after all operating expenses and taxes (but before interest and leased-line rental expense) in an amount equal

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[82]Congress could vest the §209 Special Court with jurisdiction over all proceedings to condemn rail properties for Conrail. This is but one example of how the structure carefully designed by Congress in the RRRA could be adapted in the event the Act is adjudged unconstitutional.

[83]*Cf. In re Penn Central Transportation Co. (Order No. 602)*, 340 F Supp. 851 (E.D. Pa. 1972, implementing *In re Penn Central Transportation Co. (reversal of Orders Nos. 192 and 193)*, 454 F. 2d 9 (3d Cir. 1972).

to a specified return on the rate-making base[81] as fixed by the ICC and judicially approved as "fair and equitable." This decision as to the amount of §213 payments which would constitute just compensation for the interim period would supersede the limitation of $85 million now found in §213.

Penn Central is indeed an "irreplaceable national asset." Its properties constitute a complete transportation system created over more than a century by private enterprise, and should be valued by courts employing the judicial concepts developed for the situation in which the legislature determines that the public interest requires condemnation of the unique and valuable transportation properties owned by a private enterprise which finds itself unable to continue to operate profitably. See *In re of City of New York (Fifth Avenue Coach Lines), supra; In re Port Authority Trans-Hudson Corp., supra.* Under the concepts developed by the Court of Appeals of New York, if Congress legislates that the public interest in continued rail operations requires Penn Central's unique transportation system to be acquired and operated by a publicly controlled authority, Penn Cental's claimants are entitled to have those properties (a) paid for in cash, and (b) valued at an amount which reflects substantially more than mere "scrap" or liquidation value. Valuation of properties is, of course, a judicial matter. Congress'

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[81]Cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944):

". . .the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses *but also for the capital costs of the business. These include service on the debt and dividends on the stock.* [citations omitted] By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, *should be sufficient to assure confidence in the financial integrity of the enterprise* so as to maintain its credit and to attract capital." *Id.* at 603 (emphasis added).

work ends when it passes legislation to start the judicial process of eminent domain proceedings, and appropriates the necessary funds.

This case involves the validity of a federal statute which provides for a governmentally controlled and financed corporation to acquire a unique and irreplaceable national transportation asset for consideration other than money or its equitable equivalent. Just compensation is all that the New Haven Trustee seeks from the United States. The early drafts of the RRRA would suggest that Congress might well be prepared to pay "just compensation." However, as finally enacted, the legislation which evolved as the RRRA does not ensure payment of "just compensation." Congress must now be told by the Court that its attempt, no matter how well intentioned, does not satisfy the requirements of the Fifth Amendment. Then the process of amending the RRRA to insure its constitutionality can begin.

III

THE PROCEDURES OF THE RRRA OFFEND PROCEDURAL DUE PROCESS BY MANDATING CONVEYANCE OF RAIL ASSETS PRIOR TO JUDICIAL REVIEW OF THE ADEQUACY OF THE CONSIDERATION PAID WHERE THERE IS NO POSSIBILITY THAT A COURT MAY SET ASIDE THE CONVEYANCES

In refusing on grounds of prematurity to grant so much of the New Haven Trustee's motion for summary judgment as sought an adjudication that the compulsory conveyance provisions of the RRRA are unconstitutional, a majority of the Court below failed to reach the claim that the RRRA deprives creditor claimants of Penn Central of procedural due process.

The RRRA itself clearly provides for no voting by classes of creditors as to whether the Congressionally conceived "plan of reorganization" of Penn Central is in their best interests. Nor does it provide any judicial review as to whether the impact of this plan will accord them fairness and equity in an eventual §77(d) and (e) plan which would necessarily have to follow, rather than precede, conveyance of rail properties to Conrail under §303(b), and valuation of those properties and the securities and common stock of Conrail under §303(c). This aspect of the RRRA calls for the exploration of an issue which was raised but not decided in the New Haven's own §77 proceedings, namely the procedural validity, under the due process clause, of a two-step plan of reorganization, with both voting of creditor claimants and judicial review of the their rights and the distributive provisions of the plan deferred to the second step.[85]

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[85] *In re New York, N.H. & H. R. R.*, 378 F. 2d 635 (2d Cir. 1967). The issue arose in the context of a petition of the New Haven Trustees seek-

(footnote continued on next page)

It was argued by creditors in the New Haven reorganization that such a "two-step plan" would, by itself, violate §77(e) and procedural due process guaranteed by the Fifth Amendment. However, since the New Haven creditors voluntarily decided to support inclusion of the New Haven in Penn Central, and by the time of conveyance a complete plan, including the distributive provisions, had been certified to the New Haven Reorganization Court, the issue was not subsequently squarely raised before either the ICC or the reviewing courts. In any event, it appears that this Court has never before considered a case where a *statute* enacted by Congress made a two-step decision as to reorganization mandatory, and gave dissenting creditors and stockholders no day in court on the issue of whether or not their objections to the first step were reasonably justified in the light of the respective rights and interests of those rejecting it *and all the relevant facts*.[86]

(footnote continued from prior page)

ing authority of the reorganization court to expend money of the estate for the purpose of presenting Step I of a plan (inclusion in Penn Central by sale of assets) to the ICC. Judge Friendly ruled that the expenditure could be approved whether or not a two-step plan was valid under §77(e); however he indicated that he considered a two-step plan with voting deferred of doubtful validity:

> "A complete plan would permit a vote to be taken, surely a desirable thing even if, *as we rather doubt*, the Trustees are right in saying that it is not requisite. . . ." *Id.*, at 640 (emphasis added).

[86]The text of the "cram down" clause of §77(e) reads in pertinent part:

> "*Provided*, that, if the plan has not been so accepted by the creditors [after vote] and stockholders [after vote if they have an equity], the judge may nevertheless confirm the plan if he is satisfied and finds, *after hearing*, that it makes adequate provision for fair and equitable treatment for the interests or claims of those [creditors and stockholders who voted] rejecting it; *that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts*; and that the plan conforms to the requirements of Clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)." (Emphasis added).

The RRRA is deficient precisely in providing no judicial proceedings in which a court determines "that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts." *Denver & Rio Grande, supra,* stands only for the proposition that §77(e) affords procedural due process.

As Judge Fullam noted in his concurring opinion below:

> ". . .at least until now, a decision that a stock distribution was fair and equitable has always required *contemporaneous* comparisons between the value of the creditors' and stockholders' claims and the value of the stock, a weighing of entrepreneurial risks against the prospects for growth. And merely because it is constitutionally permissible for a reorganization court to authorize sales of assets free and clear of liens, it does not follow that such sales may be approved without knowledge of the purchase price, and without a simultaneous transfer of existing liens to proceeds having value equivalent to the assets conveyed. And, of course, the magnitude of the public interest in continued rail service cannot justify treating these rail properties as if they were already public property." (JA 78-79; emphasis added).

Judge Fullam observed that the §207(b) judicial proceedings come at a time when the court simply lacks the factual basis for making findings analogous to §77(e) determinations:

> "Under the provisions of the Act, the only judicial determinations which can have a significant effect in protecting the rights of the railroad estates and their creditors must be made at a time when substantially all of the information pertinent to those judicial decisions is unknown and unknowable." *Opinion in Support of Order No. 1596, supra* (JA 150-51).

In this cross-appeal from the district court's partial denial of the New Haven Trustee's summary judgment motion, the issue is *not* whether the creditors and stockholders who attack the constitutionality of the RRRA are being "reasonable" in rejecting the RRRA, nor even whether a truly viable alternative exists under which the rights of creditors and stockholders will demonstrably be better protected. The issue is that the RRRA does not allow any court possessed of the requisite factual record on which it could make §77(e) cramdown findings to hold a hearing and decide whether or not Penn Central's properties should or should not be conveyed to Conrail. In what appears to be almost a parody of §77(e), §303(c) provides for the Special Court to make "fair and equitable" findings on the basis of an evidentiary record *after* the Penn Central's rail properties have been conveyed to Conrail. But if the Special Court finds at that stage that "fair and equitable" findings can not be made, it will be without jurisdiction to enforce that finding by any kind of meaningful judicial decree. At that stage, neither this Court, nor the Penn Central Reorganization Court, nor the Special Court could remedy the Congressional disregard of the procedural due process rights of creditors and stockholders.

As Judge Fullam observed in his *Opinion in Support of Order No. 1596*:

> "But the Final System Plan also represents a preliminary determination of the values of the properties to be conveyed, and of the values attributable to the consideration to be paid. Under normal concepts of due process in the administrative field, one would expect to find some opportunity for obtaining and considering the views of the affected property owners in advance of such value determinations." *Opinion in Support of Order No. 1596, supra* (JA 135).

Although Judge Fullam suggested that this problem might be mitigated in its procedural due process aspects by the Special Court giving less or no weight to USRA's initial value determinations, he found that:

> "A more serious, or at least more noticeable, problem stems from the fact that the conveyance and transfers pursuant to the Final System Plan are mandated to occur in advance of any judicial scrutiny and in the absence of any judicial determination as to the fairness and equity of the proposed exchanges. Arguably, even this defect might be remedied if the Special Court were empowered to set aside the conveyances if it should find unfairness or inequity. *But it is clear that the Act does not permit any such curative action by the Special Court.*" *Opinion in Support of Order No. 1596, supra* (JA 136; emphasis added).

In an attempt to avoid a holding that the RRRA offends procedural due process, the United States and USRA have now recommended to the Special Court that it "construe" the following language of §303(b)(1) of the RRRA:

> "(b) CONVEYANCE OF RAIL PROPERTIES.—(1) The special court *shall*, within 10 days after the deposit under subsection (a) of this section of the securities of the Corporation...order the trustee or trustees of each railroad in reorganization in the region *to convey forthwith* to the Corporation. . . ." (emphasis added)

as if the word "shall" read "may," and the words "to convey forthwith" read "to convey after completing a judicial determination of fairness and equity."[87]

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[87] Brief of Appellants United States, USRA and the ICC in appeals from Order No. 1596, Special Court (No. 74-8), p. 124:

> "If this [Special] Court concludes that the Tucker Act has been repealed *pro tanto*, we submit that it should read Section 303(b) in a manner that will save its constitutionality. . . . The Court can accomplish that by interpreting section 303(b) to permit the Court to decline to order the transfers. . . ."

Such a construction of the RRRA would amount to a bald judicial rewrite. Congress has legislated that the Special Court must order the conveyances within 10 days after receipt of the consideration (§303(a)) called for by a final system plan which has been certified to it (§209(c)) after approval by Congress (§208). While the Special Court would be bound by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to refuse to carry out a congressional directive that offends the Fifth Amendment rights of creditor claimants, that does not warrant a judicial rewrite of §303(b)(1). Rather, it constitutes an acknowledgement by the Governmental Defendants that §303(b)(1) is facially defective under the due process clause, at least in the absence of any Tucker Act remedy. The New Haven Trustee's motion for summary judgment, seeking to enjoin enforcement of the compulsory conveyance provisions of the RRRA on that ground, should have been granted.

IV

TO THE EXTENT THAT THE RRRA AMENDS THE SUBSTANTIVE AND PROCEDURAL PROVISIONS OF §77 OF THE BANKRUPTCY ACT, THE RRRA IS A "LAW ON THE SUBJECT OF BANKRUPTCIES" AND IS VOID FOR WANT OF GEOGRAPHICAL UNIFORMITY

A. The RRRA Is an Invalid Non-Uniform Statute as Applied to Penn Central, and Creditors of Penn Central Have Standing to Challenge the Lack of Geographical Uniformity

The RRRA provides, in §§206(c) and 206(d), for a "final system plan" which shall designate which rail properties of railroads in reorganization *in the region* shall be transferred to Conrail or other transferees specified in §206(c) for the consideration specified in §206(d). The term "region" is defined in §102(13) of the RRRA to mean seventeen designated States, the District of Columbia, and "portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order)." The provisions of the RRRA do not apply to railroads which have filed, or may hereafter file, petitions for reorganization if such railroads do business primarily in the thirty-three State area not covered by the definition of "region".[88]

The RRRA purports at the same time to override inconsistent provisions of the Bankruptcy Act (§601

[88]The RRRA also apparently does not apply to any railroad *within* the geographic region of the 17 states which files a petition for reorganization under §77 *after* July 1, 1974, the last day upon which the "180-day" findings mandated by §207(b) can be made. While there does not appear to be any such railroad now, such a situation may arise during the course of proceedings under the RRRA.

(b)), and in various sections purports to characterize the processes of the RRRA as a form of "reorganization." Thus, for example, §207(b) provides in its third sentence:

> ". . .each such court shall order that the reorganization be proceeded with pursuant to this Act unless. . ."

The fourth sentence of §207(b) provides:

> "If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act."

The clearest indication that the RRRA purports to be a law "on the subject of bankruptcies" appears in §209(b), wherein it is provided:

> "The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court."

The powers of a reorganization court under §77 of the Bankruptcy Act are, therefore, subsumed in the powers of the Special Court. Accordingly, if the RRRA is to be sustained constitutionally, it must be on the basis that Congress was exercising the power vested in it by Art. I, Sec. 8, Cl. 4:

> "To establish. . .uniform Laws on the subject of Bankruptcies throughout the United States."

This provision precludes Congress from passing a law on the subject of bankruptcies applicable to any geographic area which is less than the entire United States. This Court has stated:

> "The laws passed on the subject [of bankruptcies] must, however, be uniform throughout the United States, but that uniformity is geographical. . ."

Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902).

A majority of the court below (Judges Fullam and Bechtle) ruled that the RRRA, insofar as it purports to be a law on the subject of bankruptcies, is void on its face for violation of the geographical uniformity requirement of Art. I, Sec. 8, Cl. 4 of the Constitution.

Judge Fullam, after citing the *Hanover Bank* case, and Justice Frankfurter's observation that the uniformity requirement

> ". . .is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the state in which the bankruptcy court sits."[89]

reasoned that the geographical uniformity required by Art. I., Sec. 8, Cl. 4 requires bankruptcy legislation to apply uniformly to debtors engaged in the same business throughout the United States.

Indeed, the United States and the other governmental defendants do not seriously contend that the RRRA meets the uniformity requirement; rather, they rely primarily on the contention that creditors of a railroad do not have standing to question the application of an admittedly non-uniform statute to them. The Government urges that only railroads outside the region have standing to assert that they are being deprived of the *benefits* of the RRRA.[90]

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[89] *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 172 (1946).

[90] Judge Aldisert, dissenting on this point, reasoned that the plaintiffs lacked standing under the rule of *United States v. Raines*, 362 U.S. 17, 21 (1960) that "one to whom application of the statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." With all due respect, Judge Aldisert seems to have misunderstood the argument of the plaintiffs below.

Judge Fullam (joined by Judge Bechtle) answered this contention as follows:

> "I cannot accept the notion that only those debtors not affected by the statute can have standing to challenge the lack of geographical uniformity. In my view, every railroad subject to the statute has standing to make that challenge, and so do creditors of such railroads. The Penn Central interests are not complaining that the Act is validly applied to others and not to Penn Central; the contention is that an invalid, non-uniform statute is being applied to Penn Central.
>
> "Neither do I accept the government defendants' argument that the statute is in fact uniform because all Class I railroads now in reorganization are located in the region defined in the statute." (JA 62-63).

Judge Fullam's analysis of the standing issue is correct as to all aspects of the RRRA that constitute an exercise of Congress' Bankruptcy Clause powers.[91] We now turn to the issue of which of the RRRA's provisions depend on Congress' Bankruptcy Clause powers.

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[91] It is not contended that the provisions of the RRRA providing, for example, for governmental financial assistance (*e.g.*, §§210, 213 and 215; Title IV; Title V) are anything except an exercise of Congress' Commerce Clause powers combined with its powers to appropriate money for the common good. The New Haven Trustee does not argue that railroads outside the region are being unfairly discriminated against if they are denied access to governmental financial assistance.

B. The Court Below Was in Error in Concluding that the RRRA's Defect as Non-Uniform Legislation on the Subject of Bankruptcies Taints Only the Provision Requiring Mandatory Dismissal of §77 Proceedings

A majority of the court below, having found that the RRRA is invalid, non-uniform legislation on the subject of bankruptcies and that plaintiffs had standing to assert that constitutional defect, erred by limiting the scope of the court's holding to a single clause of a subsection of the RRRA, namely the provision requiring mandatory dismissal of §77 proceedings.[92]

The New Haven Trustee agrees with Judge Fullam that the hallmark of an exercise of Bankruptcy Clause powers is that the law "impairs the obligation of contracts." However, the RRRA's compulsory conveyance provisions (§§206, 207, 208, 209(c) and (d) and 303(b)) are constitutionally void when viewed as an exercise of Commerce Clause/eminent domain powers.[9] Therefore, if constitutional at all, these provisions must represent an exercise of the Bankruptcy Clause power.

Judge Fullam, however, reasoned that since various provisions of the RRRA considered separately have counterparts in §77, and since §77 is uniform throughout the country, it does not matter that the RRRA provisions do not apply uniformly. This reasoning, with all due respect, misses the essential point: the RRRA's provisions have combined elements found in §77 in new and different ways, and have at the same time removed safeguards that heretofore restrained the use of powers vested in bankruptcy courts by §77, and thereby maintained an approximate balance between "public interest" considerations and the property rights of secured creditors.

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[92]RRRA, §207(b), third sentence, Clause(2).

[93]See Part II-B of this Brief.

A statute must be analyzed in terms of its total effect, not just whether it is made up of elements found in another statute whose constitutionality is unchallenged.

Thus, while it is true that

> "Authority to order conveyances free and clear of liens. . . already exists under §77, and is not newly created or added by the 1973 Act" (JA 63-64),

a careful comparison of the provisions in each statute reveals these differences:

1. In §77, the "free and clear" conveyance authority, which is provided in §77(o) and in the plan provisions, §77(d), (e), and §77(b)(5), is subject to the following safeguards:

(a) A §77(o) conveyance must be a "sale," which is "in the interest of the debtor's estate and ultimate reorganization" and, most important of all, it must be determined by the railroad's trustees (charged with the fiduciary duties of the common law towards their beneficiaries) that such sale is in the interest of the debtor's estate and ultimate reorganization. Moreover, in a §77(o) transaction, the liens on the properties are transferred to the proceeds.

(b) A conveyance under a §77(d) plan containing §77(b)(5) provisions must be at a price "not less than a fair upset price" (the term is a phrase of art derived from equity receivership practice), and before the plan can be consummated it must be approved by a judge as being "fair and equitable" (another phrase derived from equity receivership practice). To be "fair and equitable," a sale under a plan must, in a conventional earnings-based reorganization, be based on an accurate appraisal of the value of the properties comprising the business as a going concern (*Consolidated*

Rock Products v. DuBois, supra; Ecker v. Western Pac. R.R., supra; Group of Institutional Investors v. Chicago, M., St. P. & Pac. R.R., supra). When §77(b)(5) is resorted to in a context where no earnings-based reorganization is possible, to be "fair and equitable" the plan must be based on an accurate appraisal of the properties being sold from the standpoint of their "highest and best value" (*New Haven Inclusion Cases*), and, to the extent that the consideration takes the form of common stock, there must be assurance by other provisions in the plan that in fact the common stock will have value equal to the monetary equivalent of the assets conveyed (*id.*).

2. In the RRR[illegible], the authority to order conveyances free and clear of liens is set forth in §§303(b)(1) and (2), but the following safeguards are absent:

(a) Viewed by analogy to §77(o), there is no requirement that the railroad's trustees must have determined that the sale is in the best interests of the estate and of ultimate reorganization.[94] Moreover, the safeguard that the liens divested from the property attach to the proceeds is absent in §303(b)(2) of the RRRA.

(b) Viewed by analogy to a §§77(d) and (e) plan containing §77(b)(5) provisions, the safeguard of "fair upset price" and a prior judicial determination, based on valuation evidence, that the plan is "fair and equitable" is absent from §303(b) of the RRRA. While

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[94]The Penn Central Trustees have, in fact, determined that it would *not* be in the best interest of the estate to convey properties under the RRRA to Conrail for the consideration prescribed by the final system plan *unless* this Court makes a definitive determination that there is a "Tucker Act remedy" for the Trustees to sue the United States in the Court of Claims. See Trustees' Report dated April 3, 1974 (Doc. No. 10 in the Joint Documentary Submission).

there is a requirement of a "fair and equitable" determination in §207(b), third sentence, clause (2), it is not possible at the time of the §207(b) determination for the court or parties to know what the "plan" is or the value of the properties or the nature, amount or value of the securities to be issued for such properties; indeed the United States insisted that *no* valuation evidence should have been considered by the Penn Central Reorganization Court in connection with the 180-day decision under §207(b). Obviously, a *post facto* determination of "fair and equitable" under §303(c), whatever its status under the due process clause of the Fifth Amendment (see Part III of this Brief), is not the same thing as a "fair and equitable" determination as to a reorganization plan prior to the conveyance.

Thus, it cannot be said that the RRRA, considered in its total impact,

> "adds *nothing*, in that respect, to the powers already granted to reorganization courts under the geographically uniform and admittedly valid provisions of §77 of the Bankruptcy Act." (JA 63; emphasis added).

It is reasonably certain that the RRRA adds *something* to the ways in which contracts of secured creditors of railroads can be impaired. Indeed, it is reasonably obvious that if Congress had intended to add *nothing* to the powers which reorganization courts now have under §77 of the Bankruptcy Act, then no amendment of §77 would have been required. If Congress had intended merely to create USRA as a planning and financing agency, and Conrail as a corporation which would receive governmental financial aid in order to acquire rail properties under §77(o) or §77(b)(5), all that would have been necessary would have been for Congress to pass a law containing the

following portions of the RRRA: Title I; Title II, §§201 to 205, §§210 to 215; Title III, §§301 and 302; Title IV; Title V; Title VI.

These portions contain the provisions of the RRRA that can be implemented without amending §77 or otherwise impairing contracts in ways not heretofore authorized by §77. The balance of the RRRA should be declared void as a non-uniform law on the subject of bankruptcies.

CONCLUSION

The New Haven Trustee agrees with those portions of the Order dated June 25, 1974:

> which enjoin defendant USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA;
>
> which enjoin defendants from taking any action to enforce §304(f) of the RRRA; and
>
> which adjudicated that §303, §304(f) and a portion of §207(b) are unconstitutional.

The New Haven Trustee, however, urges that for the reasons hereinabove set forth, the Order below should be reversed and remanded for entry of an order:

(a) Enjoining defendant USRA, Secretary of Transportation Brinegar, and the ICC[98] from taking any action to implement or enforce the following sections of the RRRA:

> §206, subsections (c), (d), (f) and (i);

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[98]In accordance with 28 USC §2322, the United States has been named as a party defendant in *Smith v. United States* insofar as this action seeks to set aside one or more orders of the ICC under the purported authority of the RRRA.

§207, in its entirety;

§208, in its entirety;

§209(c) and (d);

§302(a);

§303(b) and (c);

§304, to the extent that it purports to amend the laws applicable to abandonments and discontinuances of railroad service by railroad reorganization under §77 pursuant to §77(o) or otherwise, and by railroads operating under equity receiverships pursuant to §77(i) following dismissal of reorganization proceedings pursuant to §77(g).

(b) Adjudging the above enumerated portions of the RRRA null and void as violative of the Fifth Amendment of the United States Constitution to the extent that such portions would require railroads in reorganization or in equity receivership to convey their rail properties or designated portions thereof to Conrail in exchange for its securities and common stock, obligations of USRA, and "other benefits" referred to in the RRRA; and to the extent that such portions fail to provide compensation for interim erosion of the estates of railroads in reorganization by virtue of deficits from rail operations required by statute irrespective of the lack of any prospect for an earnings-based reorganization under §77 of the Bankruptcy Act.

(c) Adjudging that the above-enumerated portions of the RRRA are null and void as a law on the subject of bankruptcies because the RRRA is not geographically uniform throughout the United States, in violation of Article I, Section 8, Clause 4 of the Constitution of the United States, and enjoining enforcement thereof on that ground insofar as such

portions amend applicable provisions of §77 of the Bankruptcy Act.

(d) Adjudging that the motion of the New Haven Trustee for partial summary judgment is granted in full.

(e) Adjudging that defendants' motions for summary judgment are denied.

(f) In the event that the Special Court, Regional Rail Reorganization Act, shall have entered any order pursuant to its consideration of the appeals from Order No. 1596 of the Penn Central Reorganization Court under §207(b) of the RRRA deciding that Penn Central shall be reorganized by means of transferring some of its properties to Conrail, directing the Governmental Defendants and the Penn Central Trustees to petition said Special Court for appropriate modification of its order in the light of this Court's opinion.

August 28, 1974

Respectfully submitted,

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APPENDIX TO CROSS-APPELLANT'S BRIEF

In accordance with Rule 40(c) of the Revised Rules of the Supreme Court of the United States, there is set forth below the text of pertinent provisions of the Constitution of the United States and Statutes involved in this case, in addition to the text of the Regional Rail Reorganization Act of 1973, which is set forth at JA 391 *et seq.*

CONSTITUTION OF THE UNITED STATES

Article I, Section 8, Clauses 3 and 4:

"Section 8. The Congress shall have Power

* * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

"To establish. . .uniform Laws on the subject of Bankruptcies throughout the United States;"

Article I, Section 9, Clause 7:

"No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; . . ."

Amendment V

"No person. . .shall be. . .deprived of. . .property, without due process or law; nor shall private property be taken for public use, without just compensation."

STATUTES OF THE UNITED STATES

Section 77 of the Bankruptcy Act, 11 U.S.C. §205

"Section 77. Reorganization of Railroads Engaged in Interstate Commerce.—(a) Any railroad cor-